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AN ACCOUNT

OF THE

LIFE AND WRITINGS

OF

LORD CHANCELLOR SOMERS,

INCLUDING

REMARKS ON THE PUBLIC AFFAIRS IN WHICH HE WAS ENGAGED,

AND

THE BILL OF RIGHTS,

WITH

A COMMENT.

BY HENRY MADDOCK, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

"MANKIND ARE BOUND, AND ARE GENERALLY DISPOSED, TO LOOK UP WITH REVERENCE TO THE BEST PATTERNS OF THEIR SPECIES, AND SUCH AS GIVE A DIGNITY TO THE NATURE OF WHICH WE ALL PARTICIPATE."——BURKE.

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TO THE RIGHT HONOURABLE

PHILIP, EARL OF HARDWICKE,

VISCOUNT ROYSTON, AND BARON HARDWICKE,
KNIGHT OF THE MOST NOBLE ORDER OF THE GARTER,
LORD HIGH STEWARD OF CAMBRIDGE UNIVERSITY,
LORD LIEUTENANT AND CUSTOS ROTULORUM OF THE COUNTY OF CAMBRIDGE,

&c. &c. &c.

AND LATELY,

LORD LIEUTENANT OF IRELAND;

A NOBLEMAN,

RELATED TO LORD CHANCELLOR SOMERS,

AND NOT LESS DISTINGUISHED

BY HIS RANK, PUBLIC EMPLOYMENTS, AND PERSONAL QUALITIES,

THAN BY

THE EXTRAORDINARY MERITS OF HIS ANCESTORS,

THIS WORK

IS

(WITH HIS LORDSHIP'S PERMISSION)

RESPECTFULLY INSCRIBED.

ADVERTISEMENT.

THE Second Part *of this Work, extending to nearly the same number of pages as the former part, together with an Index, is ready for the press, but the publication of it is delayed in the hope that such Noblemen and Gentlemen as are in possession of unpublished information relating to Lord Chancellor Somers, may be induced to communicate the same to the Author, and by so doing, enable him to confer a value on the remainder of the work, it could not otherwise possess.*

The Second Part *will include much personal anecdote relating to the Chancellor,—a careful consideration of the momentous State Affairs in which he was engaged, from the period of the Revolution to the year* 1716, *the year in which he died, together with some brief Remarks upon the most important of his Decisions during the time he held the Seals.*

Old Buildings, Lincoln's Inn,
18th March, 1812.

ERRATA.

Page	Line	
9	4	For " meanly of think," read, " think meanly of."
30	5	From bottom, for " in 1676, one year after," &c. read, *in* 1674, *one year previous to his entry*, *&c.*
36	8	Strike out the word, *that*.
43	7	Strike out the words " *Is called to the bar*."
72	20	Instead of the words, But it is, *read*, But is it.
96	5	From bottom, strike out the words, " was not yet called to the bar."
118	5	For *libitinia*, *read*, libitina.
119	5	Instead of " Patrons and arts," *read*, " Patrons *of* arts."
142	6	From bottom, for " Judicature in," *read*, " Jurisdiction of the Lords House or Parliament, p. 141. n. c."
180	16	For omni, *read*, *omnis*.
244	22	Instead of framed, *read*, *famed*.
247	10	From bottom, instead of " can do wrong," *read*, " can do no wrong."
256	9	From bottom, read, *this*, instead of " thus."
265	15	From bottom, *read*, use, instead of *uses*.
289	10	Instead of " he was *a*, &c." *read*, " he was *as*, &c."
317	1	From bottom, *read*, 16 Sat. *lines*.
332	6	From bottom, strike out *that*, and put, " Lord Russell's."
375	2	From bottom, for oath, read, *declaration*.

PREFACE.

WITH a view to give additional interest and exactness to his studies, the Author, several years ago, was sanguine enough to form a resolution of directing his more serious studies, towards the achievement of the three following works:

I. A *History* of the *Rise* and *Progress* of the *Chancellor's Authority*, together with an *Analysis* of *Chancery Doctrine*.

II. *Chancery Principles;* including the Principles of the Practice of the Court of Chancery.

III. A *Life* of *Lord Chancellor Somers*.

In this order it was intended to produce these several works; and much time, and great labour and pains, have been employed to complete them; but it is only the Life of Lord Somers that, *at*

present, he can venture to publish. The completion of the remaining works, if health and leisure permit, will not long be deferred. On them he has bestowed, the most thought and labour, and his greatest pains and care; and on them he most prides himself, if humble labours, such as his, may be allowed to excite any pride.

Impressed with the highest admiration of the character of Lord Somers, the author always dwelt, with a peculiar pleasure, upon that part of history which had any relation to him. He lived in an age fertile in great events, and in great men; but as a *Statesman*, as a *Lawyer*, as a *Writer*, and as a *Patron* of Literature, Lord Somers was, confessedly, superior to all his cotemporaries, and exhibited a finished pattern.

In the following work, an endeavour has been made, to trace the steps of Lord Somers through life; to explain the circumstances that led to his various publications, as well as the substance of those publications; and to exhibit his political exertions in their just and genuine character.

In all countries, and whatever the form of government, History must have its use, as well as charms; but in England, where the liberty of the press is so happily established, and where each man is, more or less, a legislator; and where precedents have, and justly, so much influence, a deep and serious study of history is indispensable. Without such a study it is impossible to form a just judgment on Public Affairs. In matters of State, and of Law, every occurrence is provided for, by the wisdom of the Legislature, or by the decisions of independent Judges, who are sworn to do justice; and, therefore, every legislative and judicial measure, is entitled to command reverence and respect. They are not the arbitrary resolves of a tyrant, or of a tyrant's satellite, but emanations of national wisdom.

Strongly impressed with these sentiments, the Author has sometimes, perhaps, too minutely narrated the exertions of Lord Somers; for it seemed, that the utility and pleasure of the work to every lawyer, and lover of the constitution, would de-

pend, in a great degree, upon the fulness and exactness of the narration.

If it be true, that a man improves more by reading the story of a person eminent for prudence and virtue, than by the finest rules and precepts of morality, the Reader, it is probable, will be benefited by such a work as is here presented to him; for he will discern the bright example of a man, who, by his virtues, learning, and abilities, raised himself from a very humble rank to the highest station of honour and trust, except one, in the power of the Crown to bestow. It is no fancy piece, like the *Achilles* of *Homer*, the *Æneas* of *Virgil*, or the *Cyrus* of *Xenophon;* it is a great character, drawn from the life.

It has often been recommended, as highly useful, continually to contemplate the actions of some good and great man, and, by a sort of fancied presence, to stretch the faculties of the mind, and regulate the movements of the heart. *Epictetus* has, somewhere, a thought of this kind; and *Seneca* adopts his notion, and recommends his reader

to consider himself in the presence of *Cato*. It is a wholesome practice in an intellectual as well as in a moral point of view. "Let the mind," says *Hooker*, "have always some whom it feareth; some whose authority may keep even secret thoughts under awe. Take Cato, or, if he be too harsh and rugged, choose some other of a softer metal, whose gravity of life and speech thou lovest; his mind and countenance carry with thee; set him always before thine eyes, either as a watch, or as a pattern. That which is crooked we cannot straiten, but by some such level*."

If this Work shall any way tend to make Englishmen venerate the Constitution still more than they do, and should contribute to keep alive those great principles, and that public virtue, by which it was produced, and by which alone it can be preserved; if it contributes to inspire an honourable ambition in the minds of those who are devoted to legal pursuits, and lights up in them

* Hooker's Works, p. 297, folio edit.

honest hopes that gladden the lonesome, self-denying hours of study and meditation, the Compiler will be amply rewarded: he will then have the consolation of thinking, that he has been of some little use; that he has paid some part of that debt, which Sir Edward Coke says, every man owes to his profession; and that he has not written, or lived, wholly in vain. Phidias, desirous of perpetuating his memory, carved his image in a peculiar manner on the shield of Minerva; and in the course of this Work, the Author may, perhaps, so have stampt an image of his mind, that in future times, when Lord Somers is PRAISED, the Author of these Memoirs, humble as his merits are, will be *remembered:*

—" *While along the stream of time,*" his " *name*
" *Expanded flies, and gathers all its fame,*"
Pleas'd, if " *my little bark attendant sail,*
" *Pursue the triumph, and partake the gale.*"

Pedigree.

JOHN SOMERS,=MARGARET.
the White La-
es, in Claines,
589.

CHARD SOMERS,=JOICE CHILD.
he White La-

HARINE SEVERN,=JOHN SOMERS. MARY,=RICHARD BLURTON.

SOMERS and FOLEY BLURTON, who died young. MARY,=JOHN COOKSEY, RICHARD COOKSEY.

N SOMERS, Chancel- created Somers, n of Eve- , 1697. unmarried. MARY,=CHARLES COCKS, of Worcester. SEABRIGHT, died unmarried. ELIZABETH,=Sir JOSEPH JEKYLL, Master of the Rolls, who died without issue.

ES COCKS,=1st. ELIZABETH, sister of the Earl of Bradford. =2dly. ANN, daughter of Lord Berkley, of Stratton. JOHN,=MARY, heiress of Castleditch, Herefordshire. MARY,=SIR N. WILLIAMS. MARGARET,=1st. TO WILLIAM LYGON, Esq. =2dly. PHILIP EARL of HARDWICKE, Lord Chancellor. CATHARINE,=JAMES HARRIS, Esq. of Salisbury, ancestor of the present Earl of Malmesbury.

JAMES COCKS, died in 1758. CHARLES COCKS,=ELIZABETH, sister of Edward Lord Eliot. created Lord Somers, Baron of Evesham, in 1784.

JOHN SOMERS, the present LORD SOMERS. =MARGARET, only daughter of the Rev. Treadway Russell Nash, of Bevere, Worcestershire, D. D.

EDWARD-CHARLES COCKS. John-Somers Cocks. James-Somers Cocks. Margaret-Maria Cocks.

PHILIP, the second Earl; died without male issue. CHARLES,=CATHARINE FREMAN, only child of William Freman, Esq. of Hamels, in Herefordshire. Joseph, John, James, Elizabeth, Margaret.

PHILIP,=LADY ELIZABETH LINDSAY, daughter of James, fifth Earl of Balcarras. the *present* and third Earl of Hardwicke.

Anne. Philip; died April 7th, 1808. Catharine-Freman. Elizabeth-Mary. Caroline-Harriot. Charles-James. Joseph-John.

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Birth of Lord Somers—White Ladies—Family of Somers—Sir G. Somers—Observations on the Ancestry of Lord Somers—Taken under the care of his Aunt Blurton—Prodigies related of him—Sent to the College School—Mode of Life at White Ladies—Earl of Shrewsbury's Visit at the White Ladies—Mr. Somers patronised by the Solicitor General—His Studies—Entered of Trinity College—Entered of the Middle Temple—Introduced to the Leaders of Opposition—Lord Shrewsbury's conversion—Tale of a Tub—Mr. Somers's disposition at the Temple—Writes an Epitaph on his Sister—Writes an Epitaph on his Father and Mother.

LIFE

OF

LORD CHANCELLOR SOMERS.

BOOK THE FIRST.

Lord Somers* was born at Worcester, in a house called the White Ladies, sometime about the year 1650, as it is generally supposed, for there is no public register of his birth. The want of a register, was, probably, occasioned by the political dissensions, with which the country, was torn and harassed at

* Bishop Warburton, in one of his letters to Bishop Hurd, has the following passage:—" Birch is a good creature, and will be pleased that he has obliged you; I should have told you too, had I thought it worth while, that you should have spelt *Sommers* with a double *m;* all the letters, he, this circumstantial Doctor hath seen of that great man, spelling the name thus." [Warburton's Letters to Hurd, p. 299.] I am rather surprised at this passage, because in the small collection of Lord Somers's Letters, deposited by Dr. Birch in the British Museum, he signs his name, sometimes Sommers, but more commonly Somers, with a circumflex over the m. Mr. Cooksey clearly proves, he usually spelt his name with one m and a circumflex. [See Cooksey's Life, p. 122.] Bishop Hurd in his Dialogues has only used one m, and has omitted the circumflex. I have followed his example.

that stormy period*. During the civil wars which then raged, the City of Worcester espoused, with distinguished zeal, the cause of the ill-advised and unfortunate, Charles the First. It was the first city that publicly adhered to him, and the last garrison that surrendered to the Parliament, after a long and severe siege†. During the several changes of masters it experienced, a large pile of buildings belonging to the family of Somers (the site of an ancient monastery, called the White Ladies), was held in such veneration by both parties, as to be left entire, when the rest of the suburbs, from the north gate of the city, and even the hospital of St. Oswald, which adjoined the White Ladies, was levelled for the defence of the city. From the time of the dissolution of the monastery, it had been in the possession of a Somers, and is mentioned in the Old Chronicles, by the name of "*Somers's House.*" In a manuscript of Mr. Townshend, of Elmley Lovel, who was in the city during the whole of the siege and kept a regular diary, there is said to be, the following memorandum:—"March the "26th, 1646. The citizens and soldiers in the town, destroyed "St. Oswald's Hospital, but spared Mr. Somers's house at "the White Ladies, which was a strong stone building capa-"ble of holding 500 men with safety‡." The owners of this spacious mansion had the honor of receiving Queen Elizabeth,

* Nash's History of Worcestershire, vol. 2. p. 55. Tradition says, he was born in a house adjoining to the east side of Worcester Cathedral. [See Green's History of Worcester.]

† Green's History of Worcester. See also Nash's History of Worcestershire, 2 vol. Appendix, p. 97.

‡ See Cooksey's Life of Lord Somers, p. 4 and 117, and also 2d vol. of Nash's History of Worcestershire, in Appendix, p. 97. I am greatly indebted to Mr. Cooksey and Dr. Nash, for their accounts of Lord Somers. I have freely availed myself of their information, as far as it extends.

in her progress through Worcestershire, in the year 1585. The bed she slept in, the cup out of which she drank, and some other memorials of the royal visit, were long preserved, and are still probably, in preservation. The extensive gardens belonging to this building, are said to have furnished the pear tree laden with beautiful fruit, which so much astonished Queen Elizabeth. Seeing it growing in the market-place, to which, it is said, it had been removed only the preceding night, she added three pears to the city arms, in approbation of the good government and order, whereby such fine fruit were preserved safe in so public a situation. It was in this mansion, that Charles the Second took up his abode, during the short stay he made at Worcester, previous to the decisive battle fought the 3d of September, 1651; an engagement, which afforded Cromwell, what, in his hypocritical jargon, he termed, "his crowning mercy." The slaughter on this occasion was prodigious; the streets ran with blood. The King himself would have been taken by Cromwell's cavalry, who were close at his heels, had not one of the inhabitants drawn a great load of hay into Sidbury-gate, which blocked up the entrance, so that the horse could not enter. The King, who was a very small distance before his enemies, dismounted and crept under the hay into the town. As soon as he entered the town, a cry was made to remount the King, which was speedily done, and his majesty fled through St. Martin's, and thence to Boscobel*. Charles shifted himself at the White Ladies before he remounted, and left his garters, two pair of fringed gloves, a waistcoat, and other parts of his apparel, in the possession of the family; all of which were carefully pre-

* See vol. 2. Nash's Worcestershire. Appendix, p. 106.

served. Motives of safety, induced Mr. John Somers, the father of Lord Somers, and son of Richard, the possessor of the White Ladies, to place his wife there, and during such her residence, she gave birth to her son John, the subject of these memoirs.

The family of Somers was highly respectable. For centuries, they had possessed an estate at Clifton, in the parish of Severnstoke, in Gloucestershire. The mother of Lord Somers was Catherine Ceavern, of a respectable family in Shropshire. Subjoined is a pedigree of the family of Somers, traced some centuries back. Sir George Somers, the famous Admiral, was a branch of this family. He was the second person who discovered the Bermudas. Being shipwrecked in 1609, necessity led him to this discovery. Till then they were uninhabited, and after him were called, the *Somer* Islands*. Waller's description of these islands, is well known;

> "Heaven sure has kept that charming spot uncurst,
> "To shew how well things were created first."

Mariners, who at a distance had only seen its rocks, supposed it not only to be inaccessible but enchanted. It was the only colony that so nobly refused to surrender its charter to James the Second, at the time when surrenders were so common. The great cause of the sufferings of Sir George Somers, subsequent to his discovery, has not been disclosed. Dr. Tennison says, "I leave them to find it out by his words to King "James." "I wish that as I am the first, so I may be the

* The first Charter was dated the 29th of June in the 10th year of King James, 1614; by the name of the Governor and Company of the City of London, for the Plantation of the Somer Islands. [Vide True Relation of the Illegal Proceedings of the Somer Islands Company, &c. 1678.]

"last of sacrifices in your times. When, from private appetite, "it is resolved that a creature shall be sacrificed, it is easy to "pick up sticks enough from any thicket whither it hath "strayed, to make a fire to offer it with*." A very elegant, and perhaps, too true a reflection! In the same age, and under the same monarch, we find its farther illustration, in the unmerited fate, of the brave and accomplished Sir Walter Raleigh.

Mr. John Somers, the father of Lord Somers, followed the profession of an attorney, at Worcester, and enjoyed the family estate at Severnstoke, worth then about 300*l.* a year; no inconsiderable estate at that period. This estate had been generously settled upon him by his father at the time of his marriage, in 1649. The "*Claines Estate*," had with equal nobleness and generosity been given to his sister upon her marriage with Mr. Richard Blurton.

About the time when Lord Somers was born, his father, "*tam marte quam mercurio*," commanded a troop of horse, which formed a part of Cromwell's army, then encamped on the south-east side of the city. He had, however, been usually stationed at Upton, and attended to the protection of the family estate at Severnstoke†. An anecdote is related of him at this period, which in some degree characterises the impetuosity of the man, as well as the disjointed, and distracted times in which he lived. Whilst his troop was quartered about Upton, he frequented his parish church of Severnstoke. The minister was a zealous royalist, and though often warned against it by Captain

* See Life of Bacon, prefixed to his Works, p. 22, folio edition.

† This estate was afterwards sold out of the family, by Sir Charles Cocks to Lord Coventry. [Nash's History of Worcestershire.]

Somers, introduced into his sermons violent invectives against the opposite party. Captain Somers, indignant at the political preacher, in the midst of one of his furious harangues, fired a pistol over his head, and lodged a ball in the sounding board of the pulpit*. There is no account, by tradition, or otherwise, of any of his military exploits, but it seems, he thought it prudent upon the restoration, in 1660, to obtain, under the great seal, a full and ample pardon of all "murders, rapes, felonies, and misdemeanors of every kind committed by him before that time," and this comprehensive pardon is said to be still in the possession of some of his descendants. Being a lawyer, he remembered, perhaps, a curious observation of Sir Edward Coke's, "that no man that is wise and well advised, will refuse God and the King's pardon, how often so-ever he may have it; for there is no man but offendeth God and the King almost every day, and the pardon is the safest and the surest way†."

The Battle of Worcester, decided the fate of the royal party, and Captain Somers quitted his military capacity; took a house in the precincts of the City of Worcester, and once again resumed the pen, and amused himself with country business‡.

Lord Somers, we may observe, was born, if not of illustrious, yet of very respectable parents. If he could not boast a splendid pedigree, yet on the other hand, he could not be said to have sprung, "*ex fæce Romuli*," as some of his calumniators have unwarrantably insinuated. Great names, and

* Cooksey, p. 7. † 3 Inst. chap. 105.

‡ He was, amongst other praiseworthy acts, very assistant to Bishop Fell, in recovering the rights of St. Oswald's Hospital, for the poor men and women. [See Nash's History of Worcestershire.]

sounding titles, will always have an homage paid them, and to a certain extent, it is fit they should; but never should it be supposed, that virtue and genius, and merit, are the peculiar growth of a patrician soil. We do not meanly of think the majestic flow of the Rhine, because on tracing it to its source, we may find it born of a petty spring in Switzerland.

Let us not, however, be blind to the utility of ranks, and orders in a state; they are absolutely necessary to the perfection of a mixed government. Even Milton (Republican as he was) acknowledges this great truth,

> "Orders and degrees, jar not,
> "With Liberty, but well consist."

That perfect equality of possessions, and of rank, for which some foolish (I had almost said wicked) visionaries have contended, may in some degree exist, perhaps, amongst savage hordes, or in democracies, or under an absolute despotism, but beneath such government it is in vain to expect true liberty. Admirable is the observation of Pliny, in his advice to Tiro, "*Eum modum tenes, ut discrimina ordinum dignitatumque custodias: quæ si confusa, turbata, permista sint, nihil est ipsa æqualitate inæqualius**." True equality has been justly defined to be, the eligibility of every citizen of a state to rank and dignity, when he shall have merited them. From the nature of man, some will be wise and some foolish, some industrious and some idle, some temperate and others the reverse, and though rank and titles were denied, yet there must always be, in the nature of man, an inequality of persons and con-

* C. Plin. Epist. Lib. 9. Epist. 5.

ditions. As it is in metals so it will always be with men; there will be gold and silver, and iron, call it or entitle it how you please. You may deny them their usual appellations; you may call them all iron or all gold, but to any other than a nominal equality, you never can reduce them.

As to those persons, who like the courtly Dalrymple*, and his countryman, Macpherson†, were so squeamish respecting the ancestry of Somers, and on that account considered him as something naturally inferior, and *mean*, it might have been proper to remind them, that all mankind derive their origin from our first parents, and as surely may be convinced of this, as that the greatest number, that any arithmetician ever dreamed of, may be traced back to a single unit. Propinguity, in some sort, subsists amongst all human beings‡. Pindar in his time, sung a still higher note, and informs us, not only that men, but even gods, (that is, his gods) sprung from the same parent.

If the enemies of Somers could not overlook his lowly descent, however great his merit, why did they not cease to admire the *divine Socrates*, as he has been called; the *statuary's* son could have no charms for them. They should lay aside *Euripides*, and prattle no more about his *divine enthusiasm*. They should discard *Demosthenes* from their libraries, and though *Philip* feared and respected him, they should not. They should not praise *Eschines*, notwithstanding all his rhetoric. They should put *Epictetus* and his philosophy, and *Lucian* and his wit, in some solitary, unvisited corner. They

* See Dalrymple's Memoirs. † See Macpherson's History, 2 vol. p. 182.

‡ See the excellent verses in Boethius, Consol. l. 3, in which this idea is well expanded.

should read no more of *Terence*, or of *Phædrus*, or of *Æsop*, for how was it possible, that *slaves* could write any thing fit to be read? How very low were *Lælius* and *Scipio*, so to contaminate themselves by the company of Terence! Was this "*mitis sapientia Læli!*" Even *Horace*, the delightful Horace, "*homo omnium horarum*," the son of a *freed man*, (he confesses it) should not be extolled. How could Mæcenas delight in his company, and in the company too, of the poor *potter's* son, *Virgil!* How much juster were the sentiments of Ruffillius, who frequently reproached Horace, on account of his birth. And you too, admirable Cicero, "*Hic novus arpinus ignobilis*," neither your writings or your eloquence, nor your glorious consulship, could obliterate the irremediable disgrace of your humble origin! It will always be remembered, that the angry or the envious Dio, has recorded you as the *fuller's son*. How strange, that in your oration against Piso, you should exclaim as matter of boast, "that your honors were bestowed upon *yourself* and not upon your *family;* upon your *manners* and not upon your *forefathers;* upon the virtues themselves which the people had *witnessed*, and not upon the nobility they had *heard* of!" And you, ill-fated Pompey, "*Singularis vir, ac pene divinus*," as your eloquent friend termed you—great and renowned as you were in war, you could not overcome the objection against your obscure parentage. Noble as your aims were, glorious as your struggle was, against the overwhelming genius of Cæsar, nothing can efface the remembrance of your inglorious birth; Lucan's eloquent indignation against Cæsar, avails you not. The gods themselves were his shield! Justly they protected his patrician blood!

The prejudices in favour of birth are, indeed, of a very old date. Who is that man? What is his father? "*Quis homo hic*

est? Quo patre natus?" is a very old exclamation. This it was, that made *Metellus*, the proud Metellus, unwilling to raise his Lieutenant *Marius*, who once had toiled at the plough, to the Consulship of Rome. Marius defended the appointment of nature, against the usurpation of a stately prejudice, in a speech very vigorously conceived, and recorded by Sallust, in his concise, yet beautiful history of the Jugurthian War. In truth, the "*Divinæ particula auræ*" is not confined to any one class of men. In this, Nature is capricious. When she chooses by her precious gifts to dignify any man, she does so, and places him amongst the number of those who form, the "natural aristocracy" of mankind; and such it is, who have in all ages proved the greatest ornaments of their species. "Neither "God nor man," says the virtuous Shiply*, "will consent that "true honor and credit shall be attained by any other expe-"dients than wisdom and integrity." Thanks to the noble struggles of our ancestors, merit is, generally speaking, in this happy country, the only passport to honor and renown. High stations and places of trust, are usually, nay, always, in the best of reigns, bestowed only on the worthy. Title alone is insufficient. Great employments here, are what the Consulship was, in the happiest times of the Roman Republic; "*præmium virtutis non sanguinis.*" Rome, like Britain, owed its greatness to its unsparing encouragement and adornment of virtue and of talent. "Rome," says Fabricius, in his memorable reply to Pyrrhus, "knows no qualification for great employments, but virtue and ability." This magnanimous policy was the foundation of all its superiority; and so Cicero seems

* Works of the Right Rev. Jonathan Shiply, D. D. Lord Bishop of St. Asaph, 2 vol. p. 289.

to have thought, according to that noble passage, which concludes his *second Philippic* against Antony. "*Duo modo* "*hæc opto: unum, ut moriens populum Romanum liberum relin-* "*quam; hoc mihi majus à diis immortalibus dari nihil potest:* "*alterum, ut ita cuique eveniat, ut de republica quisque mereatur.*" I am almost ashamed, when I consider the length into which I have been drawn on this subject, but I own, an honest indignation made me anxious to vindicate the rights of nature, and the noble policy of my country, and endeavour to prove, that the history of the life of such a man as Lord Somers, was not altogether undeserving of regard, because he could not, "count nobles in his line."

The objections to Lord Somers were not confined merely to his want of noble ancestors; the *profession* of his father was frequently alluded to as matter of reproach! It was objected, that he was the son of an attorney, and it seems those prejudices then prevailed, as still prevail, with many foolish people, in depreciation of a most respectable profession. The misconduct of a few, has brought down an unjust calumny upon all, and wits and witlings contribute, all they can, to keep alive such prejudices. What Voltaire says, of one part of the profession, may justly be applied to every part of it— "*C'est un reste dé l'ancienne barbarie, d'attacher de l'avillisse-* "*ment á la plus belle fonction, de l'humanité, celle de rendre la* "*justice.*" Swift, following the old monkish maxim, "*Bonus* "*Jurista, malus Christa,*" has somewhere said, that Somers's "father was a noted rogue," but he wrote with all the bitterness of party, and the charge does not appear, by any thing that I have discovered, to be a deserving one. Swift, indeed, after he had changed his party, was more than once severe upon the attorney's son; as if forgetful that he himself was descended from a parent

of the same profession; and so too have sprung a long list of great and memorable men; men the most distinguished in the age in which they lived—men, who have flourished as poets, lawyers, statesmen, warriors, and divines.

So much for the prejudices against Lord Somers. To men of great and enlarged minds, I have on this subject, said much more than enough; but I fear, that to those who possess the puerile sentiments of Macpherson or Dalrymple, and others of their class, say what I will, it matters not; for on such a subject, they are *born* not to be convinced. They will not admit the truth of the observation of a good and great judge, Lord Chief Justice Wilmot; "The blemish of birth is invisi-
" ble to the eyes of eagles, which soar in circles round the sun,
" and is a visible object only to owls and bats, which fly by
" twilight*."

It has already been observed, that previous to the marriage of Mr. Somers's father to Catherine Ceavern, Richard Somers, his grandfather, had given his Claines estate to his daughter Mary, on her marriage to a Mr. Blurton, an eminent clothier of the city of Worcester, who settled at the White Ladies, and added greatly to that estate. This Mrs. Blurton (who had only a daughter that was married and lived at the White Ladies) became so fond of her nephew, (afterwards Lord Somers,) born, as hath been noticed at her house, that she was induced to take care of him, and prevailed upon her brother, when he removed near to the Cathedral, to leave his little son with her. From this time, she bred him up and considered him as a child of her own. Her house the young Somers always considered as his home; and there it was he principally resided, until his

* Life of Chief Justice Wilmot, p. 143. 2d edit.

removal to the University.* Dr. Hopkins, the master of St. Oswald's Hospital, was a frequent visitor at the White Ladies, and kindly contributed his advice, respecting the education of the young Somers.

There was an idle report, that prodigies occurred prophetic of his future eminence. It was affirmed and believed, by the superstitious people in the neighbourhood, that his Aunt Blurton, walking with him when a child, amongst the poultry, a beautiful roost-cock flew upon his head and crowed three times with peculiar energy! "This idle tradition," says Mr. Cooksey, "comes well attested to me, by the Rev. Mr. Pixall, "who derived it from his grandmother, who lived at the time "in intimacy with the family, and had no doubt of the fact." It must be owned it savours rather of the marvellous. There are few great men of whom some such wondrous tale is not fabricated. Horace himself tells us, (poets are allowed to deal in fiction,) that when a child, he wandered from his nurse, and tired with his little vagaries, laid down and went to sleep, when some doves, guardian angels, as it were, of the infant poet, carefully covered him with myrtle boughs†. Daniel Heinsius maintained, that Grotius was a man from the instant of his birth, and never had discovered any signs of childhood! The biographers of Tasso‡ inform us, with an imposing gravity, that at six months old, he spoke clearly and distinctly, and thought and reasoned!! "*Magnanima menzogna!*" to use the words of that poet. What must such writers think of their readers? Such idle tales deserve only to be read, except to be ridiculed, and could only have been written, one would

* Cooksey's Life, p. 9.

† Hor. Ode 4. l. 3.

‡ See Hoole's Life of Tasso.

think, to try how far credulity will extend. For my own part, I think but meanly of Mr. Pixall's tradition, and believe that the young Somers was not quite so patient as to suffer a cock to remain upon his head whilst it crowed three times; and I do believe that Somers was so far unlike Grotius and Tasso, that he was, on the contrary, as childish as others of his age, and probably, like other children, thought the moon was made of green cheese, and that every thing was gold that glittered.

He was now sent to the college school, and as the school was near his father's house, he enjoyed more of his society; with him now he constantly took his meals; with him also, he spent his vacations at his country-house at Clifton, and the apartment appropriated to him at that place, was long known by the name of *Somers's Study*. The college school was at that period superintended by a gentleman of the name of Bright, a very able man, who like many distinguished men of antiquity, exercised this delicate and important employment, rather from choice than from necessity. He was, at the same time, prebendary of the cathedral, a preferment of dignity and profit, and also proprietor of a considerable estate in the county of Hereford, which still, I believe, continues in the family. At this school it was, where the celebrated Samuel Butler, the author of the wittiest of all poems, Hudibras, had been educated, about half a century before; and the celebrated Chief Justice Vaughan is mentioned to have been educated there*. In a MS. in the British Museum†, Mr. Somers is said to have been educated at a private academy at Walsall in Staffordshire. In the same MS. it is also said that he was

* See Life, prefixed to his Reports.

† Birch's MSS. No. 4223.

placed under a Mr. Woodhouse, who kept a private academy at Sheriffs Hales in Shropshire. Perhaps he was, for a short time, at each of these places.

The young Somers, is said, very early to have exhibited great quickness; so much so, as to have obtained the character of being the brightest boy in the college school. A bright boy, it is true, does not always become a distinguished man. "This I know, (says the sensible Ascham,) "not only by reading of books in my study, but also by experience of life "abroad in the world, that those which be commonly the "wisest, the best learned and the best men also, when they "be old, were never commonly the quickest of wit when they "were young*." It was also the remark of the celebrated Judge Dodderidge, "that he found by experience, that among "a number of quick wits in youth few are found in the end, "either very fortunate for themselves, or very profitable to "serve the commonwealth†." Lord Somers, however, was an exception, for he was remarkable, both as a boy, and as a man.

On every mind, if well observed, we shall find that Nature has stampt some peculiar feature, although more prominently so in some, than in others. Whilst yet a youth, Somers was remarkable for a very pensive turn; instead of joining his young schoolfellows in the diversions incident to youth, he was seen walking and musing alone, "and never so much as looking on when "they were at play‡." It is not with boys (if the comparison is allowable) as the poet tells us it is with sheep. If the latter separate from their fellows and mope alone, one of the most beautiful of poets, in his most finished work, pronounces the

* Ascham, on Education, p. 11. † Dodderidge's English Lawyer, p. 9.
‡ Seward's Anecdotes, 2 Vol. p. 114.

sheep to be infected with a contagious disease, and condemns it to instant death*.

It is matter of general observation, that genius is generally an associate with a particular species of innocent melancholy. The pensive humour of young Somers resembled much the disposition of the poet Cowley in his youthful days, as appears from a passage written by himself, by way of accounting for his seclusion at Chertsey: "Even when I was a very "young boy at school, instead of running about on holydays, "and playing with my fellows, I was wont to steal from them "and walk into the fields, either alone with a book, or with "some one companion, if I could find any of the same tem-"per†." It has been observed, that

"———— Childhood shews the man,
"As morning shews the day."

and the remark was illustrated in Somers, for his pensiveness "grew with his growth and strengthened with his "strength," and he was remarkable all through life, for seriousness and seclusion, and a fondness for study. We do not find in his youth, any of those excesses, or "*outleaps*," as Locke calls them, which so often accompany a lad of genius. He was "a sober blooded boy," and so much so, that one who knew him well observes, that "by the exactness of

* *Quam procul aut molli succedere sæpius umbræ*
Videris, aut summas carpentem ignaviùs herbas,
Extremamque sequi, aut medio procumbere campo
Pascentem, et seræ solam decedere nocti;
Continùo culpám ferro conpesce, prius quam
Dira per incautum serpant contagia volgus.
Virg. Georg. lib. 3. l. 464, &c.

† Cowley's Works, p. 143, folio edition.

" his knowledge and behaviour he discouraged his father and " all the young men that knew him. They were afraid to " be in his company*." Such a turn of mind in a youth, though not altogether suited to his time of life, or very agreeable, perhaps, to his young associates, indicated, I think, that superiority which his maturer age displayed. An eminent writer† augers but ill of so retired a disposition; but his theory, though ingenious, is not, I think, consistent with experience. At school he acquired a sound grammatical knowledge of the Greek and Latin languages, and thereby laid the best foundation for all science, criticism, and philology, and for an endless source of literary enjoyments.

The mansion to which I have alluded, called the " White Ladies," was so very spacious, as to be the occasional residence of three or four families, and was capable from its dimensions, of accommodating many more. These families were connected by intermarriages, and had alliances with many others in the county. A sister of Somers, the father, married (as before observed) a Blurton; another sister, married a Mr. Robert Foley of Stourbridge, and one of the family of Cooksey‡ married the only daughter of Blurton. Here they all lived together, in a sort of patriarchal style, of which, in these times, it is difficult to convey an adequate idea. The following is a curious picture given by Mr. Cooksey, of the social and domestic habits of these associated families: " Their mornings were employed by each in their respective

* Seward's Anecdotes, 2 Vol. p. 114, and Dr. Birch's MSS. Brit. Mus. No. 4223.

† Stewart's Elements of the Philosophy of the Human Mind, p. 469.

‡ See the pedigree and other particulars relative to the Cookseys, in Nash's History of Worcestershire.

occupations: the culture of a large farm; the cloathing trade, then in a flourishing state; the producing and manufacturing teasels, woad, madder, and all dying materials; the making bricks and tiles, in immense quantities, to supply the demand occasioned by rebuilding the ruined city and suburbs; (from this circumstance, in some of the abusive ballads of the times, Lord Somers was styled, the "*brickmaker's son;*") and superintending the operations of above twenty families, who earned their subsistence under them, and dwelt in cottages near the White Ladies, constructed for their comfortable accommodation. The labours of the day over, they repaired for refreshment to one common table, in the great hall of the old nunnery, where seldom fewer than twenty or thirty relations and friends of the family assembled daily, and spent their evenings in the utmost cheerfulness and conviviality. The products of the farm, the supplies of fish and game, and viands of every kind, received constantly from their country connections, furnished their table with abundant plenty, and entitled such contributors to a place at it without ceremony or reserve. The annual slaughter of two brawns marked the festivities of Christmas; and a custom much better known to the Romans than our countrymen, of having a large gilt salt-seller in the midst of the table, and a collar of brawn exhibited thereon, constantly during the winter, was here retained till within this century. The Foleys, then in the full career of amassing, by their industry, that immense wealth the family now enjoy, were one or other of them constant guests. A Robt. Foley had married a sister of Blurton, and one of the Windsor family, (equally numerous and active in improvements of every kind,) a daughter of the Cookseys. The Salways, Winningtons, and Seabrights, added also to the dignity

and cheerfulness of this happy society. At their meetings were talked over and settled their several private concerns and interests, as also the politics and parliamentary adjustments of the county and the several boroughs in it*." In this mode of life, Mr. Somers possessed the great advantage of mixing study with polished conversation. The reveries of the closet were thus brought into examination, right notions enforced and false ones detected. No man indeed can attain a correct practical understanding, unless he unites study with conversation. It was on this topic that Cicero has, with so much success, rallied the speculative Cato.

A splendid accession to this family society, took place about the year 1672, when the young and accomplished Earl of Shrewsbury, whose affairs were managed by Mr. Somers the father, as his steward, acquired an attachment to the White Ladies, and company resorting to it, and was in particular charmed with the society of the young Mr. Somers, who was nine years older than the Earl, and, of course, greatly superior to him in scholastic acquirements. This Earl, was the son of the famous Countess of Shrewsbury, whose character will live scandalized to all eternity, in the pages of Pope. Of high birth, of eminent beauty and conspicuous immorality, Tacitus describes her, in his usual terse and caustic style, in that part of his immortal history, where he notices Junia Silana one of the freest of the Roman ladies, in the worst of the Roman times; "*Insignis genere, formâ, lasciviâ.*" The Earl, his father, lost his life, in a duel with the Duke of Buckingham, whose horse the wanton Countess, is said, to have held in the habit of a page, during the combat†. The young Earl, to

* Cooksey's Life, p. 14.

† This lady, the daughter of the Earl of Cardigan, was one of the celebrated

whom Charles the Second stood godfather, in the year 1660, had been brought up according to the religion of his family, a Catholic, and the priests and jesuits had from his earliest youth, assiduously endeavoured to fix him in the principles of that persuasion. Father Petre (too well known in English history) watched over him with the strictest attention, considered him as his pupil, and rendered him every office of friendship and favour in his power. Conceiving, however, a disgust to the practices of the priests and people about him, he resolved to retire into Worcestershire, where his principal estates lay, and as his house at Grafton did not then afford him a comfortable residence, and his affairs, as before observed, introduced him to an intercourse with the family of Somers, he became so much delighted with it, that he made the White Ladies, his principal abode, whilst in the country.

During his residence at this place, he contracted that friendship for the young Somers, which lasted through their lives; and on account of the happy society in which they lived, Mr. Somers, it is supposed, was induced to delay his removal to the university. There is no certainty whether Mr. Somers

beauties that adorned the Court of Charles the Second. She was the second wife of the Earl of Shrewsbury. That she was a woman of loose character cannot be doubted, but this anecdote, though adopted by Pope, is improbable. Besides the principals engaged in this duel, there were (according to the custom of those times) two other combatants engaged on each side. The Earl of Shrewsbury had for his seconds, Sir John Talbot and Mr. Bernard Howard. The Duke of Buckingham's seconds were, Sir Robert Holmes and Captain Jenkins. To all or most of these persons the Countess of Shrewsbury must have been known, and it is improbable that she should expose herself to discovery in so strange a disguise, and on so extraordinary an occasion. Captain Jenkins was killed at the same time with the Earl of Shrewsbury. Vid. 1 Vol. Beloe's Anecdotes of Literature, &c. p. 164-5. Mr. Beloe truly observes, that minute particulars and anecdotes of all the individuals may be found in the *Memoirs de Grammont*.

was ever intended for his father's branch of the profession. Mr. Cooksey confidently states, that he was always intended for the bar, but this I should rather doubt, and so, indeed, does Dr. Nash*. Probably, it was his intimacy with the Earl of Shrewsbury, and the encouragement of that nobleman, that first excited his ardour for the gown.

Mr. Somers increased in talent as in stature, and such was his promising genius, that it attracted the notice of the then Solicitor General, Sir Francis Winnington. It is said†, that Mr. Somers served his clerkship with him, but however that might be, certain it is, to his eternal honour, that Sir Francis became his active patron, and amongst other kindnesses, directed his studies‡. Such attentions deserve commemoration. It is surely, to a generous mind, one of the most precious sweets of power, to be enabled to perform the godlike act of rewarding and advancing lowly and humble merit. Such patronage must have greatly contributed to the advancement of the young Tyro. That celebrated lawyer, Serjeant Maynard, always said, to use his own expression, "he rose mainly at first by being looked upon as Mr. Noy's favourite‖." "To the friendship of Selden," says Clarendon, "Vaughan owed the best part of his reputation§." What his studies were, or what was the plan dictated to him by the Solicitor General, I

* 2 Vol. Nash's History of Worcestershire, p. 55.

† Life of Lord Somers, p. 10. This Work was anonymously published in 1716, and consists of 126 pages. The information it affords is not very material.

‡ He is said, in the Life of Lord Somers, p. 10. and in the Biographia Britannica, to have been originally a *Servitor* in Trinity College (Tit. Somers, p. 3744.) But this, Dr. Nash thinks, is improbable, as he was of a considerable family in Cheshire, (2 Vol. Nash's Worcestershire, p. 55.)

‖ State Worthies, p. 895. § 1 Vol. Clarendon's Life, p. 33.

have not, at this distance of time, been able to trace, and if discovered, it would probably, in many respects, be found rather curious than useful. Nothing certainly can be of more importance to a young man than method in his studies, and an early acquaintance with the merits of books. As Lord Coke somewhere truly says, "The uncertainty of the law and the insufficiency of the professors doth arise out of that *prepostera lectio*, the confused reading that most use in their studies." But, as most of the sciences are progressive, (the law indeed less so than other sciences,) the method of studying a science, however valuable at the time it was given, would be of little value a century afterwards. The celebrated Charles Yorke, told Dr. Warburton, that if Blackstone's Commentaries had been published when he began the study of the law, it would have saved him the reading of twelve hours in the day*.

The law is a science that wears at first a forbidding aspect, and when Mr. Somers commenced his studies, it was far less inviting than at present; so that the encouragement and assistance of Winnington, must have been of great advantage. A little perseverance, however, soon opens a more pleasing prospect, and the repulsive austerity of the law vanishes upon a nearer acquaintance; so much so indeed, that what is said of Wisdom may be applied to law. "At the first she will walk with him by crooked ways, and bring fear and dread upon him, and torment him with her discipline, until she may trust his soul and try him by her laws. Then will she return the straight way unto him and comfort him, and shew him her secrets."

* See "The Triflers," by Graves.

Whether or not, Sir Francis Winnington was an eloquent man, is somewhat doubtful, from a line in Garth's *Dispensary*:

> "But how at Church and Bar all gape and stretch,
> If *Winnington plead*, or *South* or *Only* preach*."

Whether the word *stretch* was used to denote the wearying effect of the pleader's oratory, or whether merely for the sake of the rhyme, is doubtful. If one may judge from the reading of his sermons, few I think would stretch much, through weariness, when South preached. Certain it is, Mr. Somers became a great proficient in the civil law†, that imperishable relic of Roman greatness, and the best introduction to the knowledge, not only of the English law, but of the laws of other European nations. The Imperial law was too favourable to arbitrary power in the Prince; and there, and in the countenance of torture, lies, perhaps, its principal error. That part of the civil law which enjoined the duties between sovereign and subject, was not so unexceptionable as that which enforced the duties between subject and subject. An Englishman revolts at the maxim, "*Quod principi placuit legis habet vigorem.*" Some of the Roman usages, such as those which related to slavery and adoption, the power of fathers, and the like, are unknown to the English law, and are wholly repugnant to the free spirit which it breathes; but with these and a few other exceptions, the Roman law will be found to be replete, with the correctest notions of right and wrong, and with solutions of innumerable cases of difficulty. The English law is greatly indebted to it, and has incorporated many of its maxims.

* Canto 5.

† See Lives of the Chancellors, tit. Somers. See also Life of Lord Somers, p. 15.

Chief Justice Holt, in his admiration of it, even went so far as to observe, that the laws of all nations were raised out of the ruins of the civil law, and that the principles of our law were borrowed from the civil law*. It is suited to all times, and all people. A great part of the law of nations is founded upon it. We may, in our times, truly say of the civil law, what Cicero said of it in his time, "*Ea vere præstabilis est scientia, quæ in fœderibus, pactionibus, conditionibus populorum, regum, exterarúmque nationum, in omni denique belli jure et pacis versatur.*" Under certain restrictions, it is used in the Bishop's Court, in Courts Military, in the Admiralty Courts, in the Courts of the two Universities, as well as in the Courts of Scotland; so that the knowledge of the civil law, is an indispensable part of the accomplishments of a finished lawyer. In the debates on the word *abdicate* at the period of the Revolution, (of which more will be said hereafter,) Mr. Somers was enabled greatly to illustrate the subject, by his profound knowledge of the civil law†.

* Lane and Cotton, 12 Mod. 482.

† See what the eloquent D'Aguesseau, the French Cicero, says of the civil law. "Ouvrage de ce peuple, que le ciel sembloit avoir formé pour commander aux hommes. Tout y respire encore cette hauteur de sagesse, cette profondeur de bon sens, et, pour tout dire en un mot, cet esprit de législation qui a été le caractére, propre et singulier des maîtres du monde. Comme si les grandes destinées de Rome n'étoient pas encore accomplies, elle regne dans toute la terre par sa raison, aprés avoir cessé d'y régner par son autorité. On diroit en effet, que la justice n'ait dévoilé, pleinement ses mysteres qu' aux jurisconsultes Romains; législateurs encore plus que jurisconsultes, de simples particuliers dans l'obscurité d'une vie privée, ont mérité par la supériorité de leurs lumières, de donnér des loix, á toute la postérité. Loix aussi étendues que durables; toutes les nations les interrogent encore á présent, et chacune en reçoit des reponses d'une éternelle vérite. C'est peu pour eux, d'avoir interprêté la loi des douze tables, et l'edit du préteur; ils sont les plus sûrs interprêtes de nos loix mêmes: ils prêtent, pour ainsi dire, leur

In all Mr. Somers read, if we may judge of his studies, by their fruits; his writings, his speeches, and his conduct; he seems to have remembered his destination; and to have cultivated a profound knowledge of the laws and constitution of his country. We may be assured too, that he gratified his fine taste, and invigorated his imagination, by occasionally applying himself, in his leisure hours, to the perusal of the great masterpieces of fancy and of genius, ancient as well as modern. Of this, indeed, and of his own inventive powers, we shall hereafter very fully be convinced; and it will be seen that his judgment and good taste directed him towards such inquiries as were useful or ornamental. He seems to have approved the precepts of his favourite poet, Milton:

> "That not to know at large of things remote
> From use, obscure and subtle, but to know
> That which before us lies in daily life,
> Is the prime wisdom; what is more, is fume
> Or emptiness, or fond impertinence,
> And renders us in things that most concern,
> Unpractis'd, unprepar'd, and still to seek."
>
> [Paradise Lost, Book 8. l. 193, &c.]

esprit á nos usages, leur raison á nos coutumes, et par les principes qu' ils nous donnent, ils nous servent de guides, lors même que nous marchons dans une route, qui leur étoit inconnue. [xiii. Mercuriale, 1 Vol. D'Aguesseau, p. 157, 4to. edit.]

Bishop Burnet, in his Life of Sir Matthew Hale, says, "that Hale set himself much to the study of the Roman law, and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge; yet he often said, that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there; and therefore lamented much that it was so little studied in England." [Life and Death of Sir Matthew Hale, p. 24.] Lord Chief Justice Wilmot appears to have been of the same opinion. [See Life of Chief Justice Wilmot, p. 210, 2d edition.] See also, Horæ Juridicæ Subsecivæ, by Mr. Butler, p. 60.

I am not enabled to fill up the wide interval between these the boyish days of Somers, and the period when he entered as a *commoner* of Trinity College, Oxford; which he did, on the recommendation of Dr. Hopkins, in the year 1675, being then in the 24th year of his age *. It is said, in the Biographia Britannica, on the authority of Wood's Athenæ Oxonienses, that Mr. Somers entered as a *gentleman commoner*; but Mr. Cooksey and Dr. Nash have corrected that mistake †, and it appears, that he entered only as a commoner. The circumstance of Mr. Somers being of so advanced an age, when he first went to college, makes it appear the more probable, that he was previously intended for his father's branch of the profession; more especially, as his father was in considerable business, and had but a small private fortune, with several children unprovided for; and was far too wise not to be aware how very uncertain is a barrister's advancement in life, how great soever may be his merit. It is not quite true what Wilson the logician wrote in 1553, by way of recommending the study of the law. "Lawyers," says he, "never die beggars." Luckily, however, for his country, Mr. Somers did not pursue the same branch of the profession. Fortunately, it is not in England, as it was in Hindostan, or in ancient Egypt, where every man was bound, by a principle of religion, to follow the occupation of his parent, and was supposed to commit the most horrid sacrilege if he changed it for another. Cardinal Wolsey, we are told, did once entertain so strange a design, as that of introducing a law of this nature into England ‡, but,

* 2 Vol. Nash's Worcestershire, p. 55. Mr. Cooksey says, Mr. Somers entered in 1674, and was then 22 years of age, [Cooksey's Life, 17;] but Dr. Nash is right.

† Dr. Nash's History of Worcestershire, 2 Vol. p. 55. ‡ State Worthies, p. 14.

in his own person, he exhibited the futility of such a provision. If such a one had existed before he was born, the costly Cardinal,

"Begot by butchers and by butchers bred,"

would probably have acted the same obscure part, his parent had acted before him. Such a law may be wise, as Montesquieu observes, in despotic kingdoms, where nobody dares to have emulation, but it suits not a mixed monarchy; it suits not England, whose glory principally arises from that noble emulation which pervades all its ranks, and the splendid prizes held forth to merit and genius. Mr. Somers probably felt a strong and decided predilection for his profession, or as some have denominated it, "an internal special call," and the event proved, that he did not mistake a strong inclination, for genius. Those whisperings of Nature are but seldom delusive. The philosophers truly observe, "Nature always covets what is best;" and Juvenal says truly,

"Nunquam aliud Natura, aliud sapientia dicit."

On the highest authority, we are told, that "every one hath his proper gift of God; one after this manner, another after that," and it is this bias of the mind to one individual art, rather than to another, which indicates what is commonly called genius; and this genius, if there be nothing vicious in it, ought always to be sedulously encouraged. Cicero, in his Offices, reasons admirably upon following the bent of the genius. According to him, and to common sense, "*Nihil decet invita Minerva.*" Where the mind is not with the employment, what excellence can reasonably be expected? Knowledge will not be found unless it is diligently sought, and

who can diligently pursue an uninteresting object? The inclination to a particular pursuit is not easily, if ever, overcome. As Bishop Shipley observes, (whom I am fond of quoting as at once a model of excellent sense and purity of style,) "The employments which men are satisfied with and fond of are carried on in a very different manner: even the disappointments and obstacles which discourage the irresolute become strong incitements to a willing mind, which call forth its warmest endeavours, and sometimes make it attain to a degree of excellency that seemed beyond the reach of its abilities. They too who are employed in matters suitable to their inclination, contract a steadiness and constancy of action which is always proceeding towards its end, and are not diverted from their way by the temptations which others who have no relish for their business easily give into*."

In the year subsequent to that in which Mr. Somers was entered of Trinity College, he gave five pounds toward embellishing the chapel, and some years after, he bestowed the additional sum of one hundred pounds, as appears by the Bursar's books, and in Warton's Life of Dean Bathurst†.

His college vacations, Mr. Somers dedicated chiefly, to the cultivation of the society at the White Ladies, and the friendship of the young Earl of Shrewsbury, who usually met him there.

In 1676, one year after his entry at college, Mr. Somers was enrolled as a student of the Middle Temple, and continued, it seems, to keep his terms, both at the Temple and at Oxford.

Soon after his entry at the Temple, the Earl of Shrewsbury (seeing the strong bent of his genius) introduced him to all the

* Shipley's Works, Vol. I. p. 114. † P. 81.

great patriots and leaders of the opposition to the arbitrary measures of the court. This patronage of the Earl of Shrewsbury contributed greatly to the elevation of Mr. Somers. Introduced, under his auspices, to the choicest spirits of the age, his talents were called into exertion, and improved by the example and conversation of his distinguished associates.

There are few instances of men attaining to high stations, unless their merit meets with some such powerful recommendation. Ralph, with reason, observes, "that if it had not been for Mr. Somers's political connections with Lord Shaftsbury, Sir Wm. Jones, and the other great leaders of the opposition to the court of King Charles the Second, he very probably had never attained those honours which he deserved and became so well*." Men, however, of merit, correct in conduct, and not wanting in a decent assurance, will generally find, or make, a patron. Let a young man first of all be his own patron; let him merit honours—let him look forward to the attainment of noble ends by noble means—let him deserve the admiration and support of mankind—and it is more than probable, that sooner or later, he will find patrons and friends eager to caress and support him. Corrupt as the world is represented, desert, is not yet quite an orphan. If a man of merit is wholly neglected, it is, generally speaking, owing to some infirmity or indiscretion of his own.

Such society confirmed the patriotic principles, and finished the manners of Mr. Somers. He was always, indeed, remarkable for the urbanity and sweetness of his temper. "He enjoyed, in the highest perfection," (says Addison, who knew him intimately,) "two talents which do not often meet in the same person, the greatest strength of good sense, and the most

* 2 Ralph, 784, 5.

exquisite taste of politeness*." As Pliny says to Antoninus, "*Severitatem istam pari jucunditate condire, summæque gravitati tantum comitatis adjungere, non minùs difficile quàm magnum est*†." He seems to have thought with the Stoics, that politeness was a virtue; and surely, it is recommended by the same divine and comprehensive injunction, which prescribes, charity and good will towards all men. Hume observes, that lawyers are seldom models of science or politeness‡. Whether he meant Scots lawyers, or lawyers generally, the remark, certainly, does not apply at the present time; and Lord Somers as well as many others may be mentioned as illustrious instances to the contrary, at the period, in which he lived.

During Lord Shrewsbury's residence at the White Ladies, he seems to have acquired a decided contempt for the superstitions of the Romish Church, and resolved to throw off the priests who had from his infancy surrounded him. This resolution was not lightly adopted; he had considered deeply the tenets of the Roman Church, and all that the priests could say in its behalf, and laid his doubts, as they arose, before the celebrated Tillotson, who resolved them as well as he was able; and to this circumstance it is, that we are principally indebted for those eminent treatises against Popery, to be found in the works of that distinguished prelate‖. The first time Lord Shrewsbury attended public worship, after his conversion, was in Lincoln's Inn Chapel, on Saturday the 4th of May, 1679. Tillotson, then Dean of Canterbury, preached§. The Dean, it seems, was much delighted with his noble con-

* Freeholder, No. 39. See also what Ralph says, History of England, 2 Vol. p. 785, and see 3 Vol. † C. Plin. Epis. Lib. 4. Epist. 3.

‡ Vid. 3 Vol. Hume's Hist. p. 300. ‖ See Collins's Peerage, tit. *Shrewsbury*.

§ See Birch's Life of Tillotson, p. 57.

vert, and watched him very narrowly; inspiriting every virtuous propensity, and gently chiding his aberrations*.

It was at the White Ladies, and at this period of their lives, that Mr. Somers and his gay young friend Lord Shrewsbury, are supposed to have amused themselves with the composition of that unparalleled piece of humour, entitled "*The Tale of a Tub*†." The characters of Peter, Jack, and Martin, are said to have been sketched from living persons, and these sketches of characters, after many years lying by, and passing through the hands of Lord Shaftesbury and Sir William

* Tillotson heard of some excesses into which the Earl of Shrewsbury had fallen, and penned upon the occasion an epistle, which is, perhaps, as powerful and as beautiful an human dissuasive from vice, as ever was read. One passage is peculiarly fine, "I shall only desire your lordship to think again and again how great a part of wisdom it is in all our actions to consult the peace of our minds, and to have no quarrel with the constant and inseparable companion of our lives. If others displease us, we may quit their company; but he that is displeased with himself is unavoidably unhappy, because he has no way to get rid of himself." [Birch's Life of Tillotson, p. 59.]

There is a passage in a letter of Mr. Addison's, much to the same purpose. Whilst Secretary to the Earl of Sunderland, then Lord Lieutenant of Ireland, Addison did the Honourable Major David Dunbar a signal service, on which account, that gentleman offered Mr. Addison a considerable present. Upon this, Addison wrote to him, amongst other matter, as follows: "And now, Sir, believe "me, when I assure you I never did, nor ever will, upon any pretence what-"soever, take more than the stated and customary fees of my office. I might "keep the contrary practice concealed from the world were I capable of it, "but I could not from myself; and I hope I shall always fear the reproaches "of my own heart, more than those of all mankind." [Wilton's Memoirs of Congreve, p. 146.]

† This word was used in respect of some ancient occurrence I have not been able to ascertain; for it appears one *Tubb*, wishing to have a subpœna signed by the Lord Chancellor, Sir Thomas Moore, as was the practice of those times, the Chancellor, seeing no good ground for issuing the subpœna, with his usual pleasantry, wrote under it, "*A Tale of a Tub.*" [State Worthies, p. 53, in margin.]

Temple, are said to have been given to the world, by Dean Swift. That this work was the sportive production of Mr. Somers, " I have no doubt, (says Mr. Cooksey) from the private tradition of the family, and drawn by him from real life, and originals, within his own observation*."

Blurton, the uncle of Mr. Somers, a good and pious man, furnished, it is said, the portrait of the church of England man. The character of Jack the Calvinist, exhibited that of his grandfather Somers, who was so devoted an admirer of Richard Baxter, of Presbyterian memory, as to be induced to spend most of his latter days with him at Kidderminster, and to direct his remains to be deposited under a cross in the churchyard there, as he supposed the ground hallowed by the sanctity of Baxter. Peter had his lineaments from father Petre, the Jesuit†. Fancy was much at work respecting the author, on the first appearance of this fine satire. Lord Orrery says, that when the work first appeared, it was sometimes said to be a work of Swift and his companions; sometimes that not a syllable of it was his, but that it was the work of one of his uncle's sons, a clergyman; and sometimes it was said to be the work of a person, who was to be nameless‡; meaning, probably, Lord Somers.

Alluding to the Tale of a Tub, Johnson in his Life of Swift, observes, " that Swift was its author, though it be universally believed, was never owned by himself nor very well proved by any evidence, but no other claimant can be produced, and he did not deny it when Archbishop Sharpe and the Duchess of Somerset by shewing it to the Queen, debarred him from a bishoprick§." This great critic, we may observe,

* Cooksey's Life, p. 19.

† Vide Cooksey's Life.

‡ Orrery's Life of Swift, p. 215.

§ See Life of Swift, in Lives of the Poets.

was not aware of Mr. Cooksey's information, or he would not have asserted, that no other claimant could be produced. Johnson, in another part of the Life of Swift, observed, "his Tale of a Tub has little resemblance to his other pieces. It exhibits a vehemence and rapidity of mind, a copiousness of images and vivacity of diction, such as he afterwards never possessed or never exerted. It is of a mode so distinct and peculiar, that it must be considered by itself, what is true of that is not true of any thing else he has written." In the course of his tour to the Hebrides, the Doctor again expressed a similar opinion. "I doubt," said he, "if the Tale of a Tub was his; it has so much more thinking, more knowledge, more power, more colour than any of the works which are indisputably his; if it was his, I shall only say, he was impar sibi*." These extracts plainly evince the decided opinion of Johnson, from internal evidence, that the Tale of a Tub was not really a production of Swift's. The Dedication to Lord Somers was undoubtedly Swift's, and is a noble tribute of praise to his unrivaled merits. Sheridan, in his Life of Swift, says, that soon after the publication of the work, a Mr. Waryng, a chamber fellow of Swift's, declared he had read the first sketch of it in Swift's hand writing when he was only nineteen†. Dr. Hawkesworth observes‡, that the Dean corrected an edition of the Tale of a Tub, a short time before his understanding was impaired, and these corrections, he thinks, sufficiently prove him to have been the author; but that fact is by no means conclusive. If Swift was not the

* Journal of a Tour to the Hebrides, by Boswell, p. 38.

† Sheridan's Life of Swift, p. 6.

‡ See Pref. p. 5. to Nicholl's Edit. of Swift's Works.

author of the Tale of a Tub, he was guilty of great injustice to the real author, whoever he might be; unless, indeed, he fathered the production with the consent of the author; and even then, it was a fraud upon the public to represent himself as the author, and fraud ought not lightly to be attributed to such a character as Swift. If Mr. Somers was really the author of this work, is it probable that after he had quarrelled with Swift, and had been much maligned by him, that no intimation whatever should be given by any person as to the real author of the work, since a discovery would have exhibited the virulent Dean, in borrowed plumes, and would have exposed him to much detraction, and loss of literary honour? Whoever the author was, he observes, "he had been used to quite a different employment," but that may have been said merely as a blind. There are several law allusions, and Dryden who was then the state poet, is often observed upon and ridiculed; a procedure this, very much according to the early taste of Mr. Somers. At the same time we may observe, that some of the phrases are not very lawyer-like; he uses the words "equal heirs," when the generality of lawyers would probably have written joint tenants or tenants in common, but he had not then perhaps, been initiated in the lore of the Temple, or possibly, he meant by such untechnical phrases, the more securely to veil himself from public notice. Some of the allusions in this work are to events which took place long after the work is supposed to have been written: for instance, the allegory of Jack getting on a great horse and eating custard, alludes to Sir Humphrey Edwin, Lord Mayor of London, who soon after the Toleration Act (1 Wm. and M. ch. 18.) went to a Presbyterian meeting-house in his formalities. If the Tale of a Tub was really writ-

ten by Mr. Somers, it is the only instance I am aware of, in which he has exhibited any wit or humour. Upon no other occasion, either in his writings or his speeches, except indeed in "*Dryden's Satire to his Muse*," (part of which is attributed to him,) can I find any traces of similar vivacity. In his temper he was naturally serious. All these difficulties must be left to the reader to reconcile. My own opinion, I must confess is, that the Tale of a Tub is Swift's, and the humour and manner of the piece seem to me very much of kin, though certainly superior, to the rest of his known productions. Some of the most censurable parts of the work are well noticed by Wotton*; and it must be admitted, that this humorous satire "tends to produce, in the mind of the reader," as Beattie has observed, "some very disagreeable associations of the most solemn truths with ludicrous ideas:" but I think, with Lord Orrery, that it was not an *intended insult* against christianity, but was meant only as a satire against the wild errors of the church of Rome, the slow and incomplete reformation of the Lutherans, and the absurd and affected zeal of the Presbyterians†. If the Tale of a Tub met with great praise, so too, it found most indignant censurers. Dr. Blackmore attributes the work to Swift, and rails bitterly against it, terming the writer "an impious buffoon,"—"insolent derider of the worship of his country," and employs other strong arguments, and delicate turns of satire. Had he supposed the work was written by Somers, his acrimony would not have been so excessive, for he was always warm in his admiration of him. In his "*Satire upon Wit*," there are some lines, which shew how highly he rated his talents.

* Defence of Reflexions on ancient and modern Learning, p. 519, &c.

† Orrery. Life of Swift, p. 2-3.

" But what remains will be so pure, 't will bear
" The examination of the most severe.
" 'T will *Somer's* scales and Talbot's test abide,
" *And with their mark, please all the world beside.*"

Some parts of the Tale of a Tub might with propriety have been suppressed. In the plan and the execution, it was in some degree censurable, but, (whether written by Swift or by Somers,) it was a work of youth, and in that " boiling boisterous part of life," a little indecorum of thought and expression should not be too severely criticised. The " City Bard, or Knight-Physician," as Dryden somewhere terms him, who could characterize Pope's beautiful and expressive translation of Homer, as " a laudable translation," was just the sort of man we might expect to find, as the unforgiving censurer of the Tale of a Tub. He had not taste or generosity enough, so to relish its beauties, as to be indulgent to its errors.

Whilst Mr. Somers was a student at the Temple, poetry and history engaged his attention, as well as law, and two different talents were observed to concur in his genius; which, in the opinion of many, were almost certain indications of the possessor's attaining to eminence. To an exquisite taste of polite literature, was joined a turn to business in the practice of the law. "*This*," says a biographer of his*, " implied solidity of " judgment, and proposed an industrious application, whilst " *the other* furnished delicacy of sentiment, and an elegant " diction." Similar to this, was the observation of Gratian†, " a solid and sound judgement, and a quick and sprightly " imagination, when they meet together, make the man that " has them the miracle of his age."

* Biog. Brit. tit. Somers.
† Hero, chap. 3.

As even ordinary occurrences in the life of a great man, are usually sought for with avidity, the following trifling circumstance, may not be wholly unworthy of remark. We are told that Mr. Somers's father, was at that period, accustomed to visit London during the terms, and in his way from Worcester, usually left his horse at the George Inn at Acton, where he often made mention of the hopeful son he had at the Temple. The landlord of the inn, hearing him enlarge so much in praise of his son, complimented the old gentleman one day, by observing, "Why don't you let us see him, Sir?" and accordingly, Mr. Somers requested his son, to accompany him, as far as Acton, on his return home; but when he arrived at the George, he took his landlord aside, saying, "I have brought "him, Cobbet, but you must not talk to him as you do to me; he will not suffer such fellows as you in his company*." This little anecdote shews how proud the father was of his aspiring and highly gifted son. It shews too, in some degree, on what terms of kindness they lived. Delightful reciprocities! Well might he be proud of such a son! Great, and piercing, indeed, must be the affliction of a father, of any sensibility, when he sees a child plunged into unworthy courses: his cares, his kindnesses, all unavailing and useless—his fond hopes, and bright anticipations, blighted and extinguished. On the other hand, what exquisite joy, must that father feel, who beholds his son bursting forth upon the world, in a splendid march, to virtue and to glory!

In the year 1679, the youngest sister of Mr. Somers, died at the age of eighteen, and unmarried.

"Naturæ imperio gemimus, cum funus adultæ
"Virginis occurrit†."———

* Life of Lord Somers, p. 11. † Juv.

Such is the tender thought, even of a harsh satyrist, upon a similar event. Upon this melancholy occasion, Mr. Somers penned the following elegant and affecting epitaph, in which the worth of the deceased, and the affection and genius of the brother, are beautifully pourtrayed.

Depositum
Seabrightis Somers, Johannis et Catharine Filiæ,
Quam in primo juventæ flore
Morbus rapuit importunus.
Moribus illa vultuque modesto
Omnes callebat artes
Quæ virginem decebant.
Quid plura—Hic una jacent
Parentum delicicæ et decus et dolor.
Obiit 20 Octobris, Anno { Domini, 1679. Ætat 18*.

At the commencement of the year 1680, Mr. Somers's father died at his country residence at Severnstoke. His mother survived several years, and resided for some time at the Commandery at Worcester†; but afterwards retired into another part of the country where she died, and was buried in the church of Severnstoke, March the 16th 1709. She lived therefore to see the elevation and glory of her son. On the death of his mother, Lord Somers with pious affection, erected a marble monument to the memory of his departed parents. It is affixed to the east wall of the chancel of the church of Severnstoke, the place of their interment; the arms of *Somers* impaling *Severn*, and on this monument there is an inscription, written by Lord Somers. It is in the best style of such inscriptions; it is simple, elegant and expressive.

* Cooksey's Life, p. 9.

† See Tindal's Hist. and Antiq. of the Abbey and Borough of Evesham, p. 372.

" M. S.
Johannis et Catherinæ Somers,
Amore olim et fide conjugali
Dum una vixere
Jam et tumulo conjunctorum;
Qui
Non fictâ in Deum pietate,
In universos charitate,
Comitate simul et prudentia
Vitam sibi ipsis jucundam,
Aliis utilem gratamque
Egere:
Adeo-que hinc ipsorum discessus
Ætate licet provectiore
Alterius sc. sexagesimo ætatis anno,
Alterius octogesimo sexto.
Suis, imo cunctis,
Acerbus plane visus est atque immaturus.
Viri mortem longum vidua deflevit;
Pristino dehinc in ipsum amore
Ad charissima pignora, communes liberos converso;
Sic optime defuncti memoriam colens,
Sic vere suum monstrans affectum;
Utriusque autem obitum
Boni diutissime deflebunt."

On the floor, is this inscription:

" Hic tumulus cineres tegit Johannis Somers, gen. qui obiit Jan. 1680-1, amicus fidelis, conjux optimus, pater pientissimus, moribus semper probus facilisque, jam sexa-genarius exitum anteactæ vitæ similem nactus est, mitem sibi placidumque, sed uxori, sed liberis, sed amicis luctuosum*."

Dr. Nash says, that the parents of Lord Somers, " well deserved the character here given of them†."

* 2 Vol. Nash's History of Worcestershire, p. 345.
† Ibid.

Upon his father's death in 1680-1, Mr. Somers inherited the paternal estate in Worcestershire, worth as before observed, about 300*l.* a year, no inconsiderable estate at that period; Ralph therefore was not wholly warranted in saying that "Mr. Somers's father left him a *bare competence*, and no more*."

* 2 Ralph's History of England, p. 784.

END OF THE FIRST BOOK.

CONTENTS OF BOOK II.

Mr. Somers publishes a Tract, intitled, "Case of Denzil Hollis, Esq."—Publishes a Tract, intitled, "Brief History, &c."—Publishes, "Just and Modest Vindication of the two last Parliaments"—Publishes a Tract, intitled, "The Security of Englishmen's Lives"—Translates some Epistles from Ovid—Quits College—Is called to the Bar—Employed as one of the Counsel for Pilkington and others—Patronises a Folio Edition of Milton—Translates Plutarch's Life of Alcibiades—Writes, in part, a Poem, intitled, "Dryden's Satire to his Muse."

BOOK II.

Mr. Somers was called to the bar on the 5th of May, 1676 *, but, it appears, he did not leave college until six years afterwards. Before he left college, the fruits of his labours and studies very abundantly appeared in his discussions of important law, and political topics. With his love of meditating in his closet, was conjoined a disposition and an ability to perform those active duties, due to society. According to Cunningham the historian (a contemporary of Somers,) it was the opinion of King William, that " no man lived up to the dignity of his nature, whose whole life was spent in acquiring the gifts of fortune, or in gratifying his various appetites and passions. He alone deserved the name of a man, who performed actions worthy of being held in everlasting remembrance." " It was his ambition," says the same author, " in reality to be, what others are proud to seem. He delighted in nothing more than the exercise of genuine benevolence and the defence of the liberties of mankind †." The sentiment was noble, and well became the hero who expressed it. The

* Vid. Records of Middle Temple. Mr. Cooksey [Cooksey's Life, &c. p. 17.] says he was entered at the Middle Temple in 1676, the very year in which it appears he was called to the bar!

† Cunningham's History of Great Britain, Vol. 1, p. 38.

mind of Mr. Somers was similarly disposed. Early in life, he seems anxiously to have aspired after that superior glory, which the younger Pliny has described, by "writing, what deserved to be read, and doing, what deserved to be written *." He had studied, the better to enable him to act in the world, and not merely to gratify a recluse and barren love of literature. What Tacitus says of Helvidius Priscus may be applied to Mr. Somers: "He devoted his superior talents, even in his youth, to the higher sort of studies; not for the purpose of concealing sloth, under a magnificent garb, but that he might carry himself, with a resolved mind, amidst the fortunes of his country †." He remembered, probably, the classic lesson taught him at Trinity College; "*Cognitio contemplatióque naturæ manca quodam modo atque inchoata sit, si nulla actio rerum consequatur* ‡."

Mr. Somers wrote on subjects the most interesting to the state. His principal object in these writings, was probably, the public good: a secondary object, might be, to evince to his friends and to the world, his genius in matters of a political nature. Possibly, too, he remembered the rhetorical precept of Cicero, "*Stylus optimus, et præstantissimus dicendi effector ac magister* §." His first literary work appears to have been a report of an election case, intitled, "*The memorable Case of Denzil Onslow, Esq. tried at the Assizes in Surry,*

* *Equidem beatos puto, quibus deorum munere datum est aut facere scribenda, aut scribere legenda: beatissimos verò quibus utrumque.* C. Plin. Epist. Lib. 6, Epist. 16.

† *Ingenium illustre, altioribus studiis juvenis admodum dedit: non ut plerique, ut nomine magnifico segne otium velaret, sed quo firmior adversus fortuita rempublicam capesseret.* [Tacit. Hist. Gron. Ed. Lib. 4. s. 5.] It is upon this passage, that Lipsius exclaims, "*Disce juventus et vide verum finem, quam sapientiæ studiis proponas.*"

‡ Cic. Off. Lib. 1, c. 43.

§ De Orat. lib. 1, s. 33.

July 20th 1681, *touching his Election at Haslemere in Surry, wherein is much good matter and direction, touching the due ordering of Elections for Parliament*.*" Mr. Somers did not place his name in the title-page of this tract, but it is generally ascribed to him. Lord Glenbervie†, without hesitation, attributes it to Lord Somers, and other writers on election law have followed his example‡. At the election alluded to, Mr. Onslow had thirteen votes; Sir Wm. Moore eleven: Mr. Gresham eight; and a fourth candidate seven. According to these decided majorities, Onslow and Moore were declared duly elected. The ancient constitution and custom of the borough required that the electors should be not only scot and lot men, but freeholders. Now as all those had voted, and Mr. Gresham was left in the rear, he thought proper to create some additional votes, and accordingly four voters were reared from a cabbage-garden, by the proprietor, who conveyed such portions of it to the parties concerned, as amounted to the value required; the transfer of some rooms and a cart-hovel, created two more voters, and upon the strength of these new-created votes the sheriff made another return. On the examination of witnesses on this occasion, it was proved that similar practices had prevailed before. This greatly excited the indignation of Chief Justice Pemberton, who inveighed severely against such infringements of the constitution. The jury, feeling his lordship's sentiments to be strictly correct, returned a verdict for the plaintiff, with fifty pounds damages and costs of suit§.

* Vid. 1 Vol. Somers's Tracts, p. 374, where the whole of this Tract is published.

† 1 Vol. Election Cases, 341.

‡ See 2 Vol. Heywood, 339, and Peckwell on Elections, 1 Vol. p. 319, and note c. p. 350.

§ Miscellaneous Anecdotes, illustrative of the manners and history of Europe,

In the concluding passages of this excellent tract, Mr. Somers states the object with which it was published.

"To conclude, this case, being of great use, is now made public; 1. To evidence to the world the wrong done the plaintiff by the bailiff's unjust return, and by whom, and by what means procured; as also to testify his courage and generous resolution to assert his own right, and the people's just liberty of choice, with his utmost care and great charge. 2. To vindicate the justice of the House of Commons, which are frequently aspersed, as shewing too great affection to persons in their proceedings touching elections; whereas by this case it appears how just they were in bringing Mr. Onslow to sit as a member, according to the strictest rules of common-law, and in punishing the bailiff, who so wilfully offended. 3. To direct places, having right to elect, to manage the same duly and lawfully, and not only to caution them against making votes by splitting burgage tenures by such fraudulent conveyances, where the choice is annexed to such tenure, (all such conveyances as are not real, and made *bona fide* upon good consideration, being in this case held to be void by the common-law): but the reason of this case will extend to other ways of election; for where the choice is by the body corporate, the putting out, without just cause, such as are incorporate, or the making other members of the corporation to serve a turn at an election, will be equally dangerous, and also inefectual. For as those that are so put in, gain hereby no right to elect; so those that are put out, lose no privilege of vote; and the officers and persons doing the same, are by the reason of

during the reigns of Charles II. James II. William III. and Queen Anne, by James Seller Malcolm, p. 170.

this case severely punishable. So likewise in case of election by inhabitancy, the coming to live in a place for a small time upon some particular occasion, or coming to or taking a house for to serve an election, doth not give right to vote, as was (conformable to the rules of the common law and the reason of this case) determined in the House of Commons in the case of Windsor, touching such as came to live there in attendance on the court, although they staid there three or six months. In like manner, where the election ought to be by those that pay *lot and scot**, as they call it, whereof the poor-tax is the usual measure, if any are put out by design, that have paid or ought to pay, or any by like design are put in, that have not paid, or cannot or ought not to pay; the one loseth, the other getteth no vote. And the doing of it in order to further an election thereby is an offence at common law, and punishable. So also, where elections are by freedom of places; for as elections are to be free, in respect of terror and constraint, so are they to be candid, without fraudulent practices and designs."

The next publication of Mr. Somers was intitled, "*A Brief History of the Succession, collected out of the Records, and the most authentic Historians, written for the Satisfaction of the Earl of H———.*" This tract was composed in favour of the attempt to exclude the Duke of York from the succession, which was the great political subject, from the year 1678 to the dissolution of the parliament in 1681. The copy of this work in the collection of tracts which formed part of the immense library of Lord Somers, was printed on a finer paper, and with a larger margin, than the rest of the impression, and

* From Cob's Speech, in Ben Jonson's *Every Man in his Humour*, Act 3. Sc. 7. the phrase, *scot and lot*, was then a well known term.

in this copy were several additional citations, added in Mr. Somers's hand-writing, from whence it was reasonably conjectured, that his lordship was the author*. Ralph, without hesitation, attributes this work to Mr. Somers, and says, he himself saw this tract in the Somers collection, with a great variety of notes and improvements in the hand-writing of Mr. Somers, some particulars of which he notices†. It appears to have been printed at three different periods, and with different title-pages. The first edition was printed in folio with the title already noticed. The second edition, was printed in 1688-9 in a folio of eighteen pages, and was intitled, "*A Brief History of the Succession of the Crown of England, &c. collected out of the Records, and the most authentic Historians. Written for the Satisfaction of the Nation*‡." The third edition, was printed in 1714, when the subject was again much discussed, under the title of "*A Brief History of the Succession of the Crown of England: wherein facts collected from the best authorities are opposed to the novel assertion of indefeasible hereditary right*‖." It is not my intention to enter into a history of the Bill of Exclusion, nor into an examination of all the arguments used for or against it. Suffice it to observe, that the evils of Popery were strongly felt by the nation, and as James Duke of York, the heir apparent to the crown, was known to be enthusiastically devoted to the principles of that religion, the patriots of the day determined to use all their efforts to exclude from the succession a Prince, possessed of

* See what is said of this Tract in the account of the contents of the fourth collection of the Somers Tracts.

† 1 Vol. Ralph's History, p. 519. He says, Mr. Somers "led the way."

‡ See 1 Vol. Harleian Miscellany, p. 448.

‖ See Somers Tracts, Vol. 16, p. 167.

tenets, which had so often proved fatal to civil and religious liberty. The projected Bill of Exclusion excited, as may easily be supposed, a most animated discussion. All the arguments, however, appear to be referrible either to the *legality*, or the *policy* of the proposed bill. In the policy of the bill Mr. Somers fully concurred, but it is only in support of the former of these points, that the pamphlet of Mr. Somers was immediately directed. Some of its leading principles I shall notice. He begins this tract with observing, "Men generally, at present, busy themselves in discoursing about the succession, and therefore cannot but be pleased to have a short history of it set before them; for by seeing how the crown has descended, and in what manner and upon what grounds the natural course of the descent hath been changed, they will be enabled to judge what has been the opinion of all ages in this so controverted a point, and thereby may safely direct their own."

He then observes that, "during the heptarchy the rule of succession was uncertain, or else that they had no rule at all." He then takes a review of English history from the union of the seven kingdoms under Egbert, down to the time of Harold, and thereupon observes, "These few among many other instances which may be given, will shew plainly enough, how men entitled themselves to the crown in those days, and that then it was no strange thing to hear of a parliament meddling with the succession."

He then takes a review from the time of William the Conqueror, down to Henry VIII. and observes, "That it was the universal opinion of that age, that the succession was wholly under the controul of parliaments, who not only limited it as they pleased themselves, but subjected it to the conditions and

to the appointments of others." He then brings down the history of the succession to the time of James I. and upon the whole of his historical researches he makes the following observations: "Thus I have set down before you the whole course of the English succession as plainly, as truly, and as briefly as possible. I shall leave every man to make his own observations on this historical deduction: but this one observation I believe all men must make from it; that it hath been the constant opinion of all ages, that the parliament of England had an unquestionable power to limit, restrain, and qualify the succession as they pleased, and that in all ages they have put their power in practice; and that the historian* had reason for saying, "That seldom or never the third heir in a right descent enjoyed the crown of England." He then observes, "It were as easy to shew, that in all other kingdoms the next of blood hath been frequently excluded from the succession."

He observes upon the absurd doctrine of a divine patriarchal right which kings as natural fathers of their people derived down to them from Adam. "This notion," says he, "though it be no older than the present age, has been very frequent in men's mouths and books, and has much pleased of late (as new things used to do). But they consider not that if this be true, there never can be but one rightful monarch in the universe; that is he who is the direct and lineal heir of Adam then living, and thus these great patrons of absolute power instead of supporting, do shake the thrones of all the princes in the world, since none of them at this day can make out any such title."

* Daniel, folio 5, *in vita*, Henry I.

He then proceeds to observe upon another argument, equally senseless and untenable, such as that monarchy is of divine right—that Princes succeed by the laws of God—that their title is not subject to any earthly cognizance, nor owing to any consent of the people; as to all which, he observes: "The consequences of this opinion are not once considered by these men, that thereby the property of all subjects and the laws of all countries are destroyed together; for no human laws can limit a power divinely instituted, or if you like it better in the words of a great Cardinal*, a jurisdiction which is of divine right, is not alterable by the will or power of man."

He then controverts another argument, sometimes used, viz. that this realm being entirely subdued by the Conqueror, and by him left to descend to his heirs, none of these heirs who derive a title under him can deprive those who are to succeed of any right, but must leave the crown as free to them as they themselves received it from their ancestors; as to which he observes, "I will not here insist upon the danger any Prince runs into who founds his title on force, because it would be hard to prove, that such a one does not leave as good a title open for any man who can make himself strong enough, nor need I trouble myself to shew, that all conquest does not put the conqueror into an absolute right, though it be most evident in the case of William I. who did by his sword, prosecute a claim of another nature and meant only to acquire that, and after conquest rested in it. He pretended to the crown as the gift of King Edward, and to vindicate that title he entered with arms. And though his relation to the crown was more remote than that of Edgar Atheling, (then a child) yet his title

* Card. Pallav.

was better than Harold's, the present usurper, who could pretend no kindred at all, and who had himself sworn to support the grant to William. Nor did he claim a power by conquest (though the name of Conqueror was given him by aftertimes, says Daniel) but submitted to the orders of the kingdom, desirous rather to have his testamentary title than his sword to make good his succession. But I will admit that he made an absolute conquest, and then these men will grant that he might himself dispose of this conquered kingdom. Therefore if he did not leave it to descend in such manner as they would have it go, nor did institute any such sort of succession, surely this argument of theirs will fall to the ground. Now 'tis plain that he never designed that the crown should descend but gave it to his second son, and thereby gave an example of excluding and pretermitting the unworthy."

He then controverts another argument, viz. That the fundamental laws of the land against which no Act of Parliament can be in force, have so established the succession, that the course of it cannot be altered; as to which he observes, "this is surely a new discovery unknown to our forefathers, as the foregoing history does abundantly prove. But let these objectors be asked, by what authority these imaginary laws were made? For if an authority equal to that which made them be still in being, that authority may certainly repeal them whenever it pleases to exert itself. If the King alone made them, no doubt that he may change them too. If they will say they were made by the diffusive body of the people, they run before they are aware into the guilt of worshipping that idol, the multitude, and make a great step towards placing the foundation of the government upon contract, and

consent. But then let them produce those laws or some authentic memorial of them, before it be exacted from us, to believe there were any such*."

He then considers the doctrine, that the descent of the crown purges all defects whatever, which he observes, " might be admitted, and yet could not be pertinently applied to a case where the descent itself is prevented by law." He then adverts to the argument. " That such an Act of Parliament is unjust and without a sufficient ground," as to which he observes, " I will not at present enter into the dispute how far the difference of religion, which will also necessarily draw on a change in the government, does justify them in seeking to preserve the two dearest things on earth in an orderly and lawful way. I will not (though I safely might) challenge these men to tell me, whereever any settled nation which had laws of their own, and were not under the immediate force of a conqueror, did ever admit of a king of another religion than their own. I will not insist on it that the crown is not a bare inheritance, accompanying an office of trust, and that if a man's defects render him incapable of the trust, he has also forfeited the inheritance, I need not say how far a nation is to be excused from executing justice summarily, and without the tedious formalities of the law, when the necessity of things requires haste, and the party flies from justice and its confederates are murmurous and daring, and the Prince's life in danger." How prophetic of what followed! In this tract, may plainly be traced the principles which prevailed at the Revolution. The Creed of the Whigs, and in particular of Mr. Somers, is here very distinctly displayed.

* See post, what is said as to an *Original Contract.*

Locke, Paley and others, appear to have been indebted to this treatise*.

Such is the substance of this tract. It reflects high honour upon Mr. Somers, and has, with justice, been intitled, "*A Golden Treatise*†." Lawyer-like, he cites with great fidelity, a voucher for all his facts, and exhibits much research into our ancient English historians. The style is manly, and correct; and the tract forms, altogether, an irresistible piece of reasoning, and proved a formidable weapon in the hands of the exclusionists. Dr. Brady, Sir William Dugdale and others, whose productions may be found in the Somers Tracts, attempted, but in vain, to answer this treatise. D'Avaux mentions that he had sent a treatise similar to that written by Mr. Somers, to Louis the XIVth.‡ and this treatise he ascribes to Bishop Burnet; but it was, probably, this tract of Mr. Somers's; for I do not remember that Burnet published any work on the subject.

It was a saying of Sir Thomas More, in the reign of Henry VIII§. "*Rex per Parliamentum fieri potest et per Parliamentum deprivari;* and in the next reign, Sir Thomas Smith, writing of the power of Parliament, amongst other powers, says, "*Jus in Regno succedendi præscribunt*‖," and whatever difficulties might

* It is to this treatise, probably, that Judge Foster alludes, in that part of his excellent work on the Crown Law, where he so justly animadverts upon some doctrines of Sir Matthew Hale relative to this subject. "I do not," says he, "intend to enter minutely into the history of the succession, that part hath been undertaken by others and well executed." [Foster's Discourses, p. 406.] It is the more probable, since though this great judge does not quote this treatise, he pursues much the same line of argument, and heartily approves it.

† 2 Vol. Anecdotes of Distinguished Persons, p. 115.

‡ 4 Vol. D'Avaux Neg. p. 215. § 11 Vol. State Trials, p. 23. Hargr. Edit.

‖ De Republicâ et Administratione Anglorum, Lib. 2, ch. 2.

once exist, in some narrow minds, upon this subject, no doubt now, can possibly exist. "I never entertained a doubt," says Judge Foster, "of this matter, though I am aware that some lawyers of high rank have gone upon a contrary principle; for though the Crown hath, upon principles of great wisdom and sound policy, been, in all ages, considered as a descendible right, vested in and appropriated to the royal line, and hath in fact continued in that line ever since the Conquest, yet it is certain that the course of descent in that line, hath been frequently interrupted by the authority of Parliament*."

Sir George Mackenzie, in his *Jus Regium*, and Sir Leoline Jenkins, both of them civilians and men of great learning, were amongst the number of those who sadly misapplied their fine talents, in support of the supposed indefeasible hereditary right of kings. Sir Leoline, in a speech in the House of Commons, publicly contended that "the kings of England have their rights from God alone†!" The University of Oxford voted its thanks to Mackenzie for the *Jus Regium*, and made a decree in 1683, in which the proposition of Mr. Somers, "that it is lawful to preclude the next heir from his right and succession to the crown," was solemnly condemned, as false, seditious, and impious! Blinded by patriarchal, and other fantastic systems, the doctrines of Mr. Somers were thus termed impious, and considerations of religion were mingled with topics of law, "when it is plain that religion hath nothing to do to extend the authority of the Prince or the submission of the subject, but only to secure the legal authority of the one, and en

* Foster's Crown Law, p. 189.

† Parliamentary Debates, 1 vol. p. 354. Torbuck's edit.

force the due submission of the other, from the consideration of higher rewards and heavier punishments*."

It is rather remarkable, that *De Lolme*, who appears to have studied the English Constitution, and has written an ingenious work upon it, expresses a doubt, whether *Parliament* had a *right* to exclude from the Crown the immediate heir to it, *without the express and declared concurrence of the body of the people*, and seems to consider the proposed exclusion at this period, if it had passed into a law, would have been a *dangerous precedent*†! This passage, it must be owned, betrays great want of reading. It is plain he never read the convincing tract of Mr. Somers, and one might almost imagine, indeed, he had never read English history: "No usage, law, or authority," says Paley," is so binding that it need or ought to be continued, when it may be changed with advantage to the community. The family of the Prince, the order of succession, the prerogative of the Crown, the form and parts of the legislature, together with the respective powers, office, duration, and mutual dependency of the several parts, are all only so many *laws*, mutable like other laws, whenever expediency requires, either by the ordinary act of the legislature, or, if the occasion deserve it, by the interposition of the people‡." The law upon the subject is unquestionably settled, for by an Act of Queen Anne, it is expressly made treason, "maliciously, advisedly, and directly, by writing or "printing," to maintain and affirm that "the King or Queens

* Vid. Sir Jos. Jekyll's Speech on Sacheverell's Impeachment, p. 48. fol. edit.

† De Lolme's Constitution of England, p. 396, 7, 4th edit. I have endeavoured to find this passage in the last edition in 1807, but cannot.

‡ Vid. 2 vol. Paley's Philosophy, p. 145, 6.

" of this realm with and by the authority of Parliament are not " able to make laws and statutes of sufficient force and validity " to limit and bind the crown and the descent, limitation, in- " heritance and government thereof:" and even, " by preach- " ing, teaching, or advised speaking," maliciously to affirm the same, subjects the party to a *præmunire**. This part of the Act is said to have been framed by Lord Somers himself, and is, unquestionably, a legislative sanction of the doctrine promulged by him on that important subject. It is well known, that the Bill of Exclusion passed the House of Commons, but was rejected in the House of Lords; and it is remarkable, that only three of the Bishops voted for the Bill, though the preservation of the Protestant religion was its plain and avowed object. As a sacrifice to public opinion, or as the best mode of defeating the measure, some limitations were proposed by the courtiers, and Lord Halifax assured Bishop Burnet, that any limitations whatever that should leave the title of king to his brother, though it was little more than a mere title, might be obtained of the King†; but the Whigs insisted on the total exclusion, and refused the limitations, for

* See 6 Anne, c. 7. s. 1 and 2. The statute of the 13 Eliz. c. 1. had before made a similar provision, and I wonder Mr. Somers did not notice that fact in his work. If, in future, any persons should be inclined to favour a Bill of Exclusion, and like Mr. Somers, to write upon the subject, I would advise him, for his own safety, first to consider well the provision of the 1 Anne, s. 2. c. 17. s. 3. One Matthews, a youth of 19, was tried on the statute of the 6th Anne, and found guilty, and executed!

† 1 Vol. Burnet's History, p. 49. Cunningham says, the King proposed that in case the natural right of succession should devolve on a Papist, the Prince of Orange should be appointed Regent of the kingdom by Act of Parliament; but he thought it a wicked thing to violate the right of succession in the blood royal; and this expedient is said to have been suggested by the Earl of Halifax. [1 Vol. Cunningham's History, p. 48.]

which, a modern historian*, without reason I think, has blamed them. The limitations proposed by the courtiers, were of the utmost importance, and would have deprived the successor of some of the chief appendages of royalty. By them a scheme was proposed, by which the nation, on every new reign, would be sure of having a Parliament, which the King could not, for a certain time, have it in his power to dissolve. In case of a Popish successor, the Prince was to forfeit the right of conferring any ecclesiastical preferments. No member of the Privy Council, no Judge of the Common Law or in Chancery, was to be put in or displaced, but by consent of Parliament: and the same precaution was extended to the military part of the government, to the Lord Lieutenants and Deputy Lieutenants of the counties, and to all Officers of the Navy. The Chancellor in his speech observed, "It is "hard to invent another restraint, considering how much the "revenue will depend upon the consent of Parliament, and "how impossible it is to raise money without such consent; "but yet, if any thing else can occur to the wisdom of Par-"liament, which may farther secure religion and liberty "against a Popish successor, without defeating the right of "succession itself, his Majesty will readily consent to it†." Well might Sydney and others think, "this was a gentle way of dropping the Government into a Commonwealth‡." The language of the Chancellor resembled more the scheme

* See Belsham's History. † See 8 Hume, p. 103.

‡ 1 Vol. Macpherson's State Papers, 112, 113. Sydney was not a republican, as some persons have wrongly supposed. This is apparent even from the passage I have quoted, and is fully proved in his work on Government, chap. 2, s. 16. He admired the English Constitution, but he opposed, with all his strength, the corruption, which in his time impaired its glory. Some of the arguments in his

of some hot brained Republican, than that of a grave Minister of the Crown. By such limitations, James would have been a King in *name*, but not in *power*. The remark of Hume seems just; "The succession to the crown was the chief point with the Tories; the security of our liberties with the Whigs*." Such meddling with the kingly power was not to the taste of the Whigs. They wished to preserve the constitution entire, and were therefore justly alarmed at the propossed limitations, and considered them (much to their honour) as inadmissible. Their magnanimity on this occasion appears the greater, when it is remembered that the Exclusionists considered themselves as marked for destruction, if James should succeed to the throne†. Sir William Temple was, for the reasons urged by the Whigs, averse to the limitations‡, and so indeed, was the Prince of Orange§; and a late admirable historian‖, though he does not advert to this opinion of Temple, employs much the same strain

great work will not bear a close examination, but though his judgment was occasionally wrong, his heart, I think, never was. He appears to have been actuated by the purest patriotism.

* See Hume's Essays, 1 vol. p. 137. edit. 1742. The passage is not in the latter editions of his Essays, but it would not have disparaged his judgment if he had retained it.

† Narrative of Ford, Lord Grey, p. 10. ‡ See 8 Hume, 104.

§ North's Examen. p. 153, and Dalrymple's Hist. 2 vol. Append. p. 307-8.

‖ Fox's History, p. 37. Many characters of that immortal statesman have been written, but after all, the younger Pliny, perhaps, has best described him, in that part of his letters, where he characterises Saturninus. "Audivi causas agentem acriter et ardenter, nec minus polite et ornate, sive meditata, sive subita proferret. Adsunt aptæ, crebræque sententiæ, gravis et decora constructio, sonantia verba et antiqua. Omnia hæc mire placent, cùm impetu quodam, et flumine prævehuntur: placent si retractentur. Senties quod ego quum orationes ejus in manus sumpseris, quas facilé cuilibet veterum, quorum est æmulus, comparabis. Idem tamen in *historia* magis satisfaciet, vel brevitate, vel luce, vel suavitate, vel splendore,

of argument, and joins in opinion with those who favoured the Bill of Exclusion, and condemned the proposed limitations. Lord Russell (a name ever dear to the lovers of liberty) left behind him a paper, published soon after his death, in which he explains the reason why he favoured the Bill of Exclusion: "I thought," says he, "the nation in such danger of Popery, and that the expectations of a Popish successor put the king's life likewise in such danger, that I saw no way so effectual to secure both, as such a bill. As to the limitations that were proposed, if they were seriously offered, and had passed into a law, the Duke then would have been excluded from the power of a king, and the government quite altered, and little more than the name of a king left, so that I could not see either sin, or fault in the one, where all the people were willing to admit of the other, but thought it better to have a king with his prerogative, and the nation easy and safe under him, than a king without it, which would breed perpetual jealousies and a continual struggle*." Such were the sentiments of the dying Russell, nor can we suppose he would palter with us at that awful moment. It was his earnestness relative to the Exclusion Bill to which Lord Russell imputed his death. To the same cause the deaths of the Earl of Essex, Sydney, and Cornish, were attributed†. In Lord Russell's opinions on the Exclusion Bill, Mr. Somers and his party appear to have fully concurred. What turn affairs would have taken if the Bill of Exclusion had passed,

etiam, et sublimitate narrandi. Nam in concionibus idem qui in orationibus, est: pressior tamen, et circumscriptior et adductior. Præterea facit *versus*, quales Catullus aut Calvus. [C. Plinii, Epist. Lib. 1. Epist. 16. edit. Longolii.]

Mr. Fox was "the professed admirer of Lord Somers." [Dr. Parr's Characters of Mr. Fox, 1 vol. p. 195.]

* Vid. Paper delivered by Lord Russell to the sheriffs.

† Speke's Secret History, p. 10.

it is impossible to divine. By that bill no successor to Charles II. was named. The Duke of Monmouth had pretensions to the crown, and had many adherents; but the Prince of Orange would have opposed those pretensions, and much confusion must have ensued. Soon after the Exclusion Bill was thrown out, Dr. Parker, then Archdeacon of Canterbury, wrote to the Duke of York to persuade him to leave his communion. In allusion to the late parliamentary efforts, he says, "I confess this is not the most proper time for overtures of this kind, the great work of yesterday makes me apprehend, that your Royal Highness, like the traveller in Italy, will wrap your cloak the more eagerly about you, as the blast of the cold *sciorocco* was violent to strip you of it*."

The Bill of Exclusion failed, but much was then accomplished. The absurd doctrine, of *divine, indefeasible, hereditary right*, received a death blow. Men's minds were, by the debates on this bill, and the discussions it occasioned, gradually prepared to comprehend and approve the salutary doctrines, which were afterwards so successfully recognized at the grand æra of the Revolution.

Swift observes, "That the legislature should have power to change the succession, whenever the necessities of the kingdom require, is so very useful towards preserving our religion and liberty that I know not how to recant. The worst of this opinion is, that at first sight it appears to be Whiggish: but the distinction is thus: the Whigs are for changing the succession when they think fit, although the entire legislature do not consent; I think it ought never to be done but upon great

* 2 Vol. Wynne's Life and Writings of Sir Leon. Jenkyns, p. 690.

necessity, and that with the sanction of the whole legislature.*" I am not aware when the question of the exclusion was discussed, that either in debate, or in writing, the Whigs maintained the principle attributed to them by Swift. Certainly Mr. Somers maintained no such doctrine in the tract we have been noticing. Blackstone, indeed, plausibly infers, from the Exclusion Bill, that the *inheritance of the crown is indefeasible unless by parliament*, (meaning thereby, king, lords, and commons,) *else*, says he, *it had been needless to prefer such a bill*†. How far, at the subsequent period of the Revolution, such a principle was promulged, will hereafter be more particularly considered; and then it is, that notice will more properly be taken of the vacillations of Swift, on this important topic.

The pen of Mr. Somers was very prolific at this period, for he soon after published a tract, intitled, "*A just and modest Vindication of the two last Parliaments.*" It was drawn up in answer to a Declaration of Charles II. penned by Lord Chief Justice North, afterwards Lord Keeper Guildford‡, and published 8th April 1681, after the dissolution of the Oxford parliament§. Either through diffidence, or from motives of prudence, the name of Mr. Somers was not prefixed to this or to any other of his productions, but like the Sibyls' leaves, they were left to take their chance, and by their merits alone, to secure protection. I say prudence, for the reasoning of this, as well as of the former pamphlet, is so pointed and bold, and so

* "Some Remarks on the Barrier Treaty." 3 vol. Swift's Work, Nic. edit. p. 423.

† See 1 vol. Commentaries, p. 209.

‡ See North's Life of Lord Keeper Guildford.

§ It was read in all churches and chapels throughout the kingdom. See "Caveat against the Whigs."

adverse to the measures and views of Charles, and of his infatuated brother, the Duke of York, that it was more than probable it would incur their unappeasible displeasure. It must, however, be observed, that even after the Revolution, when all the restraints from apprehension had vanished, he never openly avowed either this, or any other of his productions*; so that modesty, as well as prudence, might have actuated his conduct. "*Prodesse quam conspici,*" was his motto, and apparently, the motive of his conduct all through life.

Soon after printing was introduced, Cardinal Wolsey warned Henry VIII. to be cautious how he encouraged it†. The art continued free, after the first invention, for fifty years; but as soon as its effects in politics and religion were felt, all the crowned heads in Europe at once seized on, and appropriated it, to themselves. In England, the crown claimed both the power of licencing what should be printed, as well as the monopoly of printing. Two licences were therefore necessary to be petitioned for by an author; one, a licence to print, and another licence to print his own work. When the crown had thus claimed the right of printing, it secured that right by patents, and by charters. Still further to secure the monopoly, the printers were combined into a company, called the Stationer's Company, by whose laws, none but members could print any book: and this company assumed a power of seizure, confiscation, and imprisonment, and the decrees of the convenient Star-chamber confirmed their tyranny. This court usurped an entire jurisdiction over the press, and may be said to have exercised a sort of legislative power in all matters relating to it. It appointed licensers—it prohibited books—it inflicted penalties—issued warrants of search, and dignified one of its officers

* Biog. Britan. tit. Somers.

† Argt. of Lord C. J. De Grey, on appeal on literary property.

with the name of "messenger of the press." The courts of Westminster Hall had jurisdiction in cases of libel, but the Attorney General, for good reasons, chose rather to proceed in the Star-chamber; and this is the cause why there are no cases of libel in the King's Bench, previous to the Restoration. On the suppression of the Star-chamber, in 1641, the long parliament, after their rupture with the king, assumed by ordinance the same power the Star-chamber had done, with regard to the licencing of books. It was against this ordinance, that Milton levelled his eloquent and persuasive tract, the *Areopágitica**. At the Restoration the press became free; but two years after, an act was passed†, reviving the republican ordinances. This act expired in 1679, but was revived in the first year of James II.‡ for seven years, and was continued even after the Revolution, and until the 5th of King William. Many admirable publications issued from the press, in the interval between 1679 and 1684-5, the period of James's accession to the throne, and in particular, these very treatises of Mr. Somers. Had a licenser of the press been then in being, Mr. Somers's tracts would not have seen the light. A licenser would have startled at the bold truths he proclaimed. The present precautions for the discovery of printers‖ were not then in being, and well it was for the country, considering the servility of the judges at that period, that they did not then exist. Mr. Somers or his printer, or both, would otherwise have been encompassed by the walls and horrors of a prison. Those, however, who sold this tract, were (at least according to modern doctrine) open to prose-

* See Lord Camden's judgment in the "Case of Seizure of Papers," 11 Vol. Harg. State Trials, p. 322.

† 13 and 14 Car II. c. 33. ‡ 1 James II. c. 17.

‖ Vid. 39 Geo. III. c. 79, s. 33, &c.

cution, and it must be owned with South, that the toleration of these writings and others of the same kind, affords some proof that arbitrary power was not, at that period, quite so active and malicious, in regard to the press, as it has been represented. "The charge of arbitrary power," says that prelate, writing in those times, "is a calumny which more than sufficiently contradicts and confutes itself by this one argument, That any subject who has presumed to libel and reproach his prince with it, is seen alive and well, nay rich and thriving after he has done so*." For five years successively, after the year 1694, attempts were made to obtain a new licencing act, and strange to say, a bill for that purpose passed the House of Lords. Fortunately, however, for British liberty, it was rejected in the House of Commons, and never again, we must devoutly hope, will any man presume to bring forward so destructive a measure†. It is somewhat remarkable, that the great men, who in the Convention Parliament, were employed to draw up, "*Heads of Grievances, absolutely necessary to be redressed,*" should not, amongst their other valuable suggestions, have introduced any one article relative to the press. "Trajan," says Mr. Somers, "was an excellent Prince, endowed with all heroical virtues, yet the most eloquent writers, and his best friends, found nothing more to be praised in his government, than that in his time, all men might think what they pleased, and every man speak what he thought, and he had no better

* 2 Vol. South's Sermons, p. 374, fol. edit. According to Burnet, some printers were discovered and indicted, but the grand-jury threw out the indictment, on the ground that the books were not *maliciously and seditiously* printed; but the good Bishop quarrels with this grand-jury law. [Vid. 1 Vol. Burnet's History O. T. p. 495, fol. 51.]

† I believe it was rejected on the second reading, for a second reading was not ordered. See Journals of the House of Commons, 12 vol. p. 468.

way of distinguishing himself from his wicked predecessors, than by hanging up the spies and informers, whom they had employed for the discovery of crimes*."

According to Bishop Burnet, the "Just and modest Vindication" was first penned by Sydney, but a new draught was made by Somers, and corrected by "*one Jones*†." North, in his *Examen*, supposes that Jones is the author of the tract, and affects to criticise it‡. *Echard* says, that the "Just and modest Vindication," was ascribed to Jones, nor does he attribute any share of this treatise, either to Somers or Sydney||, Mr. Hatsell also has, mistakenly, attributed this work to Jones§. What puts it beyond all dispute, that this tract was the production of Mr. Somers's pen, is the testimony which the late Lord Hardwicke, in his State-papers¶, gives upon the sub-

* Vid. Security of Englishmen's Lives, &c.

† This *one Jones*, was the same person who was afterwards so well known, first as Attorney General, and afterwards as Judge, under the title of Sir Wm. Jones; and so great was his merit, that North, in his gossiping life of his relation, the Lord Keeper Guildford, seems half inclined to praise him, though Jones was so zealous a Whig, and North so staunch a Tory. In the same manner, Burnet calls the famous Prior, "*one Prior*," which gave occasion to Dodsley's epigram—

> *One Prior!* and is this, this all the fame
> The poet from th' historian can claim?
> No! Prior's verse posterity shall quote,
> When 'tis forgot one Burnet ever wrote.

Such petty, undignified revenge, in his last legatory work, directed to be published after his death, was surely unworthy of so excellent and distinguished a prelate. In Dryden's satirical poem of Absalom and Achitophel, he alludes to Sir William Jones, under the title of "Bull-faced Jonas." Cunningham says he was eloquent. [Cunningham's History, p. 26.]

‡ North's Examen, p. 508. || Echard's History of the Revolution.

§ 4 Vol. Hatsell's Precedents, p. 200 in note.

¶ See Hardwicke's State Papers.

ject, for he there observes, that this treatise, "*all in the handwriting of Lord Somers,*" was amongst the manuscripts, which he, (Lord Hardwicke,) once had in his possession.

In the Declaration of Charles, to which I have alluded, were summed up the supposed hardships he had then suffered from the then two last parliaments, (the Oxford parliament, and the preceding parliament at Westminster,) and it represents "many instances," as the Declaration terms them, "of their unwarrantable proceedings;" and in conclusion, "the King assures his subjects that nothing should ever alter his affection for the protestant religion as established by law; nor his love to parliaments; for he would still have frequent parliaments." This Declaration, from the time and manner of its promulgation, appears to have excited considerable notice. It was in answer to it, that the "*Just and modest Vindication*" was penned; and, like all the other productions of Mr. Somers, it is replete with the finest constitutional principles. Some of its leading doctrines I shall notice.

He commences this tract in the following manner. "The amazement which seized every good man upon the unlooked-for dissolution of two parliaments within three months, was not greater than at the sight of a Declaration pretending to justify, and give reasons for such extraordinary proceedings. It is not to be denied, but that our kings have in a great measure been intrusted with the power of calling, and declaring the dissolutions of parliaments. But lest through defect of age, experience or understanding, they should at any time forget, or mistake our constitution; or by passion, private interest, or the influence of ill counsellors, be so far misled as not to assemble parliaments, when the public affairs require it; or to declare them dissolved before the ends of their meeting

were accomplished: the wisdom of our ancestors has provided by divers statutes, both for the holding of parliaments, annually, and that they should not be prorogued or dissolved till all the petitions and bills before them were answered and redressed*. The constitution had been equally imperfect and destructive of itself had it been left to the choice of the Prince, whether he would ever summon a parliament or put it into his power to dismiss them arbitrarily at his pleasure†." Mr. Somers then

* For this doctrine, he cites 4 Edw. III. c. 14, 36 Edw. III. c. 10, 2 Richd. II. No. 28.]

† It was the opinion of Algernon Sidney, (see Sidney's Works, p. 422,) that by law, the King had no power of *calling* or *dissolving* parliaments. Milton admits, and laments, the power of the King to dissolve parliaments. In support of Mr. Somers's opinion, it may be observed, that there was an ancient custom of making proclamation in Westminster Hall before the end of every session, of the day of dissolution, that all matters depending might have a regular decision; and by the 2 Rd. II. No. 28, cited by Mr. Somers, it was provided, "That all petitions and bills should have a good and gracious answer and remedy ordained thereupon before the departing of every such parliament." [Vid. Rot. Parl. 3 vol. p. 61.]

Mr. Justice Dodderidge was of opinion, that "Parliaments ought not to be dissolved as long as any bill remains undiscussed; if it be," says he, "the King is perjured." [Vid. the Antiq. of the Parl. of Eng. p. 38.] *Parliamentum separari non debet, dummodo aliqua Petitio pendeat indiscussa vel ad minus ad quam non fuit determinatum responsum; et si Rex contrarium permittat, perjurius est:* this passage, Mr. Atwood says, in his argument in answer to Lord Chief Justice Herbert's Defence, "is as I find it in an ancient MS. of the Modus." [See Atwood's Argt. 7 Vol. State Trial, 631. n. f. See also this MS. alluded to, as to this point in Modus Ten. Parl. by Coke, in 4 Inst. p. 11.]

Lord Coke, as Prynne has shewn, in his Animadversions on the 4th Inst. p. 6, 7, imagined the *Modus Tenendi Parliamentum*, to be an older work than it really was. Selden thought it was not more ancient than the time of Edw. III. [Selden's Titles of Honour.]

The opinions of Somers and Dodderidge, of Sidney and of Milton, on this subject, have met with few admirers. The consent of Charles I. in 1641, to the act which took away his right of dissolving the parliament, was in a great degree the cause

complains of the *manner* of the dissolution, in as much as it was not done by the advice of the privy council, and of the manner of the Declaration, in as much as it was not expressed as issuing with the advice of the council. He complains of a secret influence over the actions of Charles. The tract pointedly asserts, that his Majesty seemed resolved to give a Popish successor to his people. It maintains, that parliament should not give money to the maintenance of alliances before it is known what they are, for what end they are designed, and the probability of attaining that end. It condemns the league with Spain, for having too indiscriminately pledged Charles to afford assistance. He, in a very remarkable passage, expressly vindicates the right of the Commons to commit those who had published their abhorrence of parliaments; such publication amounting, in his opinion, to a breach of its privileges. "But the Commons made arbitrary orders for taking persons into custody, for matters that had no relation to privileges of parliament. The contrivers of this Declaration, who are so particular in other things, would have done well to have given some instances of these orders. If they intend by these general words, to reflect on the orders made to take those degenerate wretches into custody, who published under their hands, their abhorrence of parliaments, and of those who, in an humble and lawful manner, petitioned for their sitting, in a time of such extreme necessity; surely they are not in good earnest,

of all the mischiefs that ensued. The law now clearly is, that the crown hath the sole right of summoning parliaments, and after they are met, of continuing, adjourning, proroguing, or dissolving them. Mr. Burke admits, what he terms, the undoubted prerogative of the crown to dissolve parliaments; and makes some excellent observations on the manner on which that "most critical and delicate trust" should be exercised. [See Burke's Works, 2 Vol. p. 634, 4to. edit.]

they cannot believe themselves, when they say, that these matters had no relation to privileges of parliament; if the privileges of parliament be concerned when an injury is done to any particular member, how much more is it touched, when men strike at parliaments themselves, and endeavour to wound the very constitution? If this be said in relation to *Sheridon**, who has since troubled the world with so many idle impudent pamphlets upon that account, it is plain that his commitment was only in order to examine him about the Popish Plot, and his endeavours to stifle it, (though his contemptuous behaviour to the House deserved a much longer confinement,) and it was insolence in him to arraign their justice, because they did not instantly leave all their great debates to dispatch the business relating to him."

"*Thompson* of Bristol was guilty of divers great breaches of privilege; but yet his commitment was only in order to an impeachment; and as soon as they had gone through with his examination, they ordered him to be set at liberty, giving security to answer the impeachment which they had voted against him. But it is a thing so strange and new to the authors of the Declaration, that the House of Commons should order men to be taken into custody, for matters not relating to privilege? Have they not heard, that in the 4 *Edward VI. Cricketost* was committed for confederating in an escape; that 18 *Jac. Sir Francis Michael* was committed for misdemeanors, in procuring a patent for the forfeitures of recognizances, together with *Fowles*, *Gerrard*, and divers others, (none of whom were members of parliament,) that 20 *Jac. Dr. Harris* was taken into custody for misbehaving himself in preaching; and that

* See what Burnet says of Sheridon, 1 Vol. History of his Own Times, p. 485. fol. edn. See also 3 Vol. Hatsell's Precedents, p. 257.

3 *Car. Burgesse* was committed for faults in catechizing, and *Levet* for presuming to exercise a patent, which had been adjudged a grievance by a committee of the Commons in a former parliament. There would be no end of giving instances of those commitments, which may be observed in almost every parliament, so that the House of Commons did but tread in the steps of their predecessors, and these sort of orders were not new, though the Declaration takes the liberty to call them arbitrary. The Commons had betrayed their trust, if they had not asserted the right of petitioning, which had been just before shaken by such a strange, illegal, and arbitrary proclamation*." It asserts the right of the Commons to impeach Ministers, or to address the King to remove them. "The Commons in Parliament, have ever used two ways in delivering their country, from pernicious and powerful favourites, the one is from a parliamentary course of justice by impeaching them, which is used when they judge it needful to make them public examples, by capital, or other high punishments, for the terror of others. The other is by immediate address to the King, to remove them as unfaithful or unprofit-

* The proclamation against tumultuous petitions, drawn by Chief Justice North, is here alluded to. It is a true remark of Mr. Hume, in his History, "that the general question with regard to the privileges of parliament, has always been, and still continues, one of the greatest mysteries in the English Constitution; and in some respects, notwithstanding the accurate genius of that government, these privileges are at present as undetermined as were formerly the prerogatives of the Crown." [6 Hume, 459.] Mr. Hume then lays down these two principles, *1st. Such privileges as are founded on long precedent, cannot be controverted; 2dly. Such privileges also as are essential to all free assemblies, which deliberate, they may be allowed to assume, whatever precedents may prevail.* [*Ib.*] I purposely avoid entering into a discussion of the late case of John Gale Jones, as I have already laid my observations, upon that case, before the public.

able servants. Their lives, their liberties, or estates, are never endangered, but when they are proceeded against in the former of these ways. Then legal evidence of their guilt is necessary, then there must be a proper time allowed for their defence. In the other way the parliament acts as the King's great council, and when either house observe that affairs are ill administered, that the advice of parliaments is rejected or slighted, the course of justice perverted, our councils betrayed, grievances multiplied, and the government weakly and disorderly managed, (of all which our laws have made it impossible for the King to be guilty) they necessarily must, and always have, charged those who had the administration of affairs, and the King's ear, as the authors of these mischiefs; and have, from time to time, applied themselves to him by addresses, for their removal from his presence and councils. There are many things plain and evident, beyond the testimony of any witnesses, which yet can never be proved in a legal way. If the King will hearken to none but two or three of his minions, must we not conclude that every thing that is done comes from their advice? And yet, if this way of representing things to the King were not allowed, they might easily frustrate the inquiries of a parliament. It is but to whisper their councils, and they are safe. The parliament may be busied in such great affairs as will not suffer them to pursue every offender through a long process; and besides, there may be many reasons why a man should be turned out of a service, which perhaps would not extend to subject him to punishment. The people themselves are highly concerned in the great officers and ministers of state, who are servants to the kingdom as well as to the King. And the representatives of the people, the Commons, whose business it is to present all grievances, as they are

most likely to observe soonest the folly and treachery of those public servants, (the greatest of all grievances,) so this representation ought to have no little weight with the Prince. This was understood so well by Henry IV. a wise and brave Prince, that when the Commons complained against four of his servants and counsellors, desiring they might be removed, he came into parliament, and there declared openly, that though he knew nothing against them in particular, yet he was assured, that what the Lords and Commons desired of him was for the good of himself and his kingdom; and therefore he did comply with them, and banished those four persons from his presence and councils, declaring at the same time, that he would do so by any others who should be near his royal person, if they were so unhappy as to fall under the hatred and indignation of his people. The records and histories of the reigns of Edward I. Edward II. Edward III. and indeed of all other succeeding kings, are full of such addresses as these; but no history or record can show that ever they were called illegal or unparliamentary, till now." It maintains "that the public treasure is sacred and unalienable by the Crown*." It maintains also, "that the due and impartial execution of the laws is the unquestionable duty of the Judges;" and it expresses a hope, "that they will always remember that duty so well, as not to necessitate a House of Commons to do theirs, by calling them to account for making private instruction the rule of their judgment, and acting as men who have more regard to their places than their oaths." It asserts, "that the loss of freedom of debate in Parliament, will soon and certainly be followed by a general loss of liberty." It calls the notion, that the

* See on this subject what is said, *post*, relative to the *Banker's* case.

interests of the King and people are not only distinct, but opposite, " a fatal notion." It maintains the propriety of the Bill of Exclusion, and asserts that many Acts of the like nature have passed heretofore upon less necessary occasions. Mr. Somers then insists, " that the preservation of every Government depends upon an exact adherence unto its principles, and the essential principle of the English monarchy being that well proportioned distribution of powers, whereby the law doth at once provide for the greatness of the King, and the safety of the people, the Government can subsist no longer, than whilst the Monarch enjoying the power which the law doth give him, is enabled to perform the part it allows unto him, and the people are duly protected in their rights and liberties*." Is this the language of a republican, as Lord Somers has sometimes so falsely been termed? or is it not, rather, the wholesome language of the English Constitution? The conduct of Mr. Somers and the Whigs on the subject of the proposed exclusion, before mentioned, affords undeniable proof that they were not republicans; otherwise they would readily have acceded to the measure proposed on that occasion by the Court, and would, by Act of Parliament, have established republicanism, in every respect, except in name. In the following passage of this tract, Mr. Somers explains his principles: " We have followed the writers of the Declaration through the several parts of it, wherein the House of Commons are reproached with many particular miscarriages, and now they come to speak more at large, and to give caution against two sorts of ill men. One sort they say,

* The Prince of Orange seems to have copied these noble observations, in his Highness's Declaration.

are men fond of their old beloved commonwealth principles, and others are angry at being disappointed in designs they had for accomplishing their ambition and greatness. Surely if they know any such persons, the only way to prevent the mischiefs which they pretend to fear from them, had been to have discovered them, and suffered the Parliament to sit to provide against the evil, they would bring upon the nation, by prosecuting of them. But if they mean by those lovers of commonwealth principles, men passionately devoted to the public good, and to the common service of their country, who believe that Kings were instituted for the good of the people, and government ordained for the sake of those that are to be governed, and therefore complain or grieve, when it is used to contrary ends, every wise and honest man will be proud to be ranked in that number. And if commonwealth signifies the common good, in which sense it hath in all ages been used in all good authors, and which *Bodin* puts upon it, when he speaks of the Government of France, which he calls a republic, and no good man will be ashamed of it. Our own authors, *The Mirror of Justice*, *Bracton*, *Fleta*, *Fortescue*, and others in former times, and of later years, *Sir Thomas Smith*, Secretary of State in the reign of *Queen Elizabeth*, in his discourses of the Commonwealth of England, *Sir Francis Bacon*, *Coke*, and others, take it in the same sense. And not only divers of our statutes use the words, but even King *James*, in his first speech unto the Parliament, acknowledgeth himself to be the servant of the Commonwealth, and King Charles I. both before and in the time of war, never expresseth himself otherwise. To be fond therefore of such common principles, becomes every Englishman; and the whole kingdom did hope, and were afterwards glad to find, they had sent such

men to Parliament. *If the Declaration would intimate that there had been any design of setting up a democratical government, in opposition to our legal monarchy, it is a contumacy just of a piece, with the other things which the penners of this Declaration have vented, in order to the laying upon others the blame of a design to overthrow the government, which only belongs unto themselves.*" The tract then proceeds to maintain by elaborate argument, " the right of the Commons to impeach any commoner, and the jurisdiction of the Lords*." These are *some* of the leading principles which form the basis, of " *the Just and Modest Vindication!*" Noble and patriotic they are, and such as Englishmen at the present hour, prize and cherish. Whoever has a taste for perspicuous, manly, vigorous argumentation, and high minded constitutional doctrines, may with pleasure and edification peruse and reperuse this precious tract. It cannot be read too often, or admired too much.

It seems, however, that this tract, though acknowledged to be a production superior to any of the kind, at that period, had nevertheless, according to Burnet, " no great effect, the spirit of the party being spent†." This is hardly to be credited; and certainly, it was so much noticed, that it was thought to have laid the foundation of Mr. Somer's future rise in the world. Echard, who appears not to have known the real author of this piece, says, " the author was soon lashed by the satyrical pen of John Dryden, who undertook to expose the exorbitancies of him and

* It was once pretended that the Lords had no right to try a *commoner* by Impeachment. See the progress of this doubt related in the 4th vol. of Hatsell's Precedents, p. 200, in note. See also, what North says in his Life of Lord Keeper Guildford, 2 vol. p. 9, last edit.

† Burnet's History of his Own Times.

his friends*." To this pamphlet, therefore, we probably owe that exquisite satire of Dryden's, the "*Absalom and Achitophel.*"

In the same year, Mr. Somers again appeared in print, and published a tract, intitled, "*The Security of Englishmen's Lives; or, the Trust, Power, and Duty of the Grand Juries of England. Explained according to the Fundamentals of the English Government, and the Declaration of the same made in Parliament by many Statutes.*" In the title page of this work it is stated, to be "*published for the Prevention of Popish Designs against the Lives of many Protestant Lords, and Commoners, who stand firm to the Religion and ancient Government of England.*" To this work likewise, no name was affixed. Burnet says†, the tract passed as written by *Lord Essex*‡, though (says he) "I understood afterwards, it was written by Somers, "who was much esteemed, and often visited by Lord Essex, "and who trusted himself to him, and writ the best papers "that came out in that time." By others, this work, like the former, was attributed to Sir William Jones; Roger North, a staunch Tory, in his Examen‖, gives a character of Jones, and in allusion to this work, observes, "*he was famed or*

* Echard's History of the Revolution. See also, Critical History of England, p. 280.

† See Burnet's History of his Own Times.

‡ This Lord fell a martyr to the Constitution as his father Lord Capel did before him. He was murdered in the Tower. Mr. Speke, who seems to have known the particulars of the murder and was desirous of making them public, was imprisoned and sorely persecuted. [See Secret History, &c. published by the family of Speke, pp. 10, 11. 8vo. printed in 1715.] This tract was republished in 1798, with a Sketch of the History of Jurors, by a Barrister. Not being aware of the above fact, he appears *doubtful* who was the author.

‖ North's Examen, p. 508.

else defamed, for another book, intitled "Advice to Grand Juries." By some, the work was attributed to the Earl of Shaftesbury himself, but certainly it was the production of Mr. Somers, and is proved to have been so by the late Earl of Hardwicke, who states that amongst the manuscripts of Lord Somers, was this very treatise, as well as the other we have already noticed, *all of it in the hand-writing of Lord Somers**. The attributing of the tract to so many celebrated persons, is a very sufficient proof, was other proof wanting, of the merit and publicity of the work. The circumstances which occasioned this publication were these. The Earl of Shaftesbury was sent to the Tower, upon a charge of high treason, and soon after, a bill of indictment was presented to a grand jury in London, composed of many of its chief citizens; and more than ordinary pains were taken by the ministry, to prevail on the jury to find the bill. The witnesses were examined in *open court*, before the grand jury at the Old Bailey, and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, Lord C. J. Pemberton and C. J. North both declared, "that it had always been the practice to examine witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the King†." They swore many incredible things against the Earl, mixed with other things, that looked very like his extravagant way of talking. The draught of an association was also brought forward, as a proof of his treason, though it was not laid in the indictment, and was proved only by one witness. The grand jury, contrary to the expectation of the Court, returned *ignoramus*,

* Vid. Hardwicke's State Papers.

† 3 Vol. Hargrave's State Trials, p. 417.

upon the bill*, and the Earl was thereupon released from the Tower. Upon this, the courtiers declaimed bitterly against grand juries; in which, they said, the spirit of the party appeared; since men, even upon oath shewed that they were resolved to find bills, or *ignoramus*, as they pleased, without regarding the evidence; and a new set of addresses were sent round the kingdom, in which was expressed an abhorrence of the association found in Lord Shaftesbury's cabinet, and a complaint that justice was denied the King. It was said on this occasion, that the grand jury ought to find bills even upon dubious evidence, much more when plain treason was sworn, since all they did in finding a bill, was only to bring the person to his trial, and then the falsehood of the witnesses was to be detected. But in defence of the grand juries, it was said that, by the express words of their oath, they were bound to make true presentments of what should appear true to them, and therefore if they did not believe the evidence they could not find a bill, though sworn to†. To maintain this important proposition was the object of Mr. Somers's tract, and most ably and convincingly does he support it. Mr. Somers himself states the object of his pub-

* When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, *ignoramus*, or, we know nothing of it: intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "*not a true bill*:" or, (which is the better way) "*not found*," and then the party is discharged without farther answer. But a fresh bill, may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it, "*a true bill*," antiently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. [4 vol. Blackstone's Commentaries, p. 305.]

† See 2 vol. Burnet. O. T. p. 508, &c.

lication. "The present purpose" (says he) "is to shew how well our worthy forefathers have provided in our law for the safety of our lives, not only against all attempts of open violence, by the severe punishment of robbers, murderers, and the like, but the secret poisonous arrows that fly in the dark to destroy the innocent by false accusation and perjuries. Our lawgivers foresaw both their dangers from the malice and passion that might cause some of private condition to accuse others falsely in the court of justice, and the great hazards of worthy and eminent men's lives, from the malice, emulation and ill designs of corrupt ministers of state, or otherwise potent, who might commit the most odious murders in the form and course of justice: either by corrupting judges, as dependent upon them for their honour and great revenue*;

* This argument is now of no avail, for by the 12 and 13 Wm. III. ch. 2. s. 3. it is provided, that the judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the Address of both Houses of Parliament, it may be lawful to remove them. A bill of the same kind had been proposed in 1692-3, and passed both Houses, but was denied the Royal Assent. [See 2 vol. Ralph, p. 411.] By a statute, 1 Geo. III. c. 23. enacted at the earnest recommendation of his present Majesty from the throne, the judges are continued in their offices during their good behaviour, *notwithstanding the demise of the crown*, which was formerly held immediately to vacate their seats, and their full salaries are absolutely secured to them during the continuance of their commissions: his Majesty declaring, with a truly patriotic spirit, "THAT HE LOOKED UPON THE INDEPENDENCE AND UPRIGHTNESS OF THE JUDGES, AS ESSENTIAL TO THE IMPARTIAL ADMINISTRATION OF JUSTICE, AS ONE OF THE BEST SECURITIES OF THE RIGHTS AND LIBERTIES OF HIS SUBJECTS, AND AS MOST CONDUCIVE TO THE HONOUR OF THE CROWN." A nobler sentence never fell from the lips of any Prince! How severe a satire was this upon some of the preceding monarchs! This sentiment, so promulgated at the commencement of his long reign, the Sovereign has happily for the country, observed with a religious regard. Nothing can be purer than the administration of British justice. That inexorable Tory, Dr. Johnson, [Boswell's Life, vol. 2. p. 227.] saw something to blame in this Act of Parliament. He

or by bribing and luring men of depraved principles, and desperate fortunes to swear falsely against them."

thought Lord Bute "gave up a great deal." If he had considered the subject more deeply, it would be found perhaps, that with very good intentions, nothing in reality had been conceded; for able lawyers were of opinion, that in consequence of the Act of Settlement, the commissions of the judges did not determine by the demise of the Crown, though the construction of the Act, and the practice since the passing of it had been otherwise. [See Life of Lord Chief Justice Wilmot, p. 15.]

Sir Michael Foster, who is so much respected for his Treatise on the Crown Law, expresses himself thus, in a Letter addressed to Sir Eardly Wilmot. "I think the last precedent was a precipitate proceeding, against the plain scope and intent of the Act of Settlement, and derogatory to the honour, dignity and constitutional independence of the Judges, and the Crown itself. [Ibid.]

It is observable that, during the reigns of Elizabeth and James the First, the commissions of the Chief Justices of the King's Bench were general, without any specification of the tenure by which they held their seats; they were therefore removeable by the Crown. The puisne Judges of the King's Bench, and the Chief Justice and puisne Judges of the Common Pleas, held *quamdiu nobis placuerit*, which was in effect the same thing as if their commissions had been general. The Chief Baron and other Barons of the Exchequer were appointed *quamdiu se bene gesserint*, and therefore were not removeable at the will of the Crown. [See Rose's Observations on Fox's Work, p. 35. in note.]

In 1640, the House of Lords requested of Charles I. "that all the Justices of the King's Bench and Court of Common Pleas, and the Barons of the Exchequer that go circuits, may hold their places by patent from his Majesty *quamdiu se bene gesserint*, and not *durante bene placito;* and this request was granted by the King; [See 2 vol. Nalson's Collection, pp. 719, 727.] and during the remainder of his reign the patents were made out in that form.

During the *Protectorate*, either the patents of the Barons of the Exchequer and of the other Courts must have been made out *durante bene placito* only, or they were disregarded altogether, for the Protector removed a Baron of the Exchequer and a Judge of the Court of Upper Bench (which was the name then given to the Court of King's Bench.) [Vide Heywood's Vindication of Fox, p. 401.]

For some time after the Restoration, the judges were raised to the Bench upon the condition, *quamdiu se bene gesserint*, but after the struggle of the Court with

As the subject of this tract is of the utmost importance, I shall state some of its leading principles. Mr. Somers contends that "it is made a fundamental in our government, that unless it be by Parliament, no man's life shall be touched, for any crime whatever, save by the judgment of at least twenty-four men; that is, twelve or more to find the bill of indictment, whether he be a peer of the realm or commoner, and twelve peers or above if a lord*, if not, twelve commoners to give the judgment upon the general issue of not guilty joined; of these twenty-four the first twelve are called the grand inquest, or grand jury, for the extent of their power, and in regard that their number must be more than twelve, sometimes twenty-three or twenty-five, never were less than thirteen, twelve whereof at least must agree to every indictment, or else 'tis no legal verdict; if eleven of twenty-one, or of thirteen, should agree to find a bill of indictment, it were no verdict. The other twelve, in commoners cases, are called the petit jury, and their

Judge Wild in 1670, the judges afterwards appointed, had their patents made out, *durante bene placito.*

Holding on this condition in 1679, four judges were, for political purposes, removed; and during the short and inauspicious reign of James the Second, no less than ten judges were removed!

King William and Queen Anne's judges were all, I believe, appointed *quamdiu se bene gesserint*, and were therefore not removable; nor did the Stat. of 12 and 13 Wm. III. c. 2. s. 3. which prescribes the form of the judges commissions, take effect till the accession of the House of Hanover; for it was provided by that Act *that after that event* the commissions should be made *quamdiu se bene gesserint*, &c.

From some experience, I concur with Dr. Parr, that at the present day, "corruption, would in English judges, be a prodigy quite as rare as parricide is said to have been among the old Greeks." [Characters of the late Charles James Fox, &c. 2 vol. p. 365.]

* See Blackstone, as to Trial of Peers.

number is ever twelve; but the jury for a peer of the realm may be more in number though of like authority*. The office and power of these juries is *judicial*, they only are the judges, from whose sentence the indicted are to expect life or death: upon their integrity and understanding, the lives of all that are brought into judgment do ultimately depend; from their verdict there lies no appeal, by finding guilty or not guilty they do complicately resolve both law and fact. *As it hath been the law, so it hath always been the custom and practice of these juries upon all general issues pleaded in cases civil as well as criminal, to judge both of the law and fact. So it is said in the report of Lord Chief Justice Vaughan, in Bushel's case, that these juries determine the law in all matters where issue is joined and tried in the principal case, whether the issue be about a trespass or a debt, or disseisin in assizes, or a tort, or any such like, unless they should please to give a special verdict, with an implicit faith in the judgment of the court, to which none can oblige them against their wills*†."

"Every man of the twelve must agree to the verdict freely, without compulsion, fear or menace, else it is no verdict." He observes, 'that grand juries, ought, by the old common law, to be lawful liege people, of ripe age, and not over aged or infirm, and of good fame amongst their neighbours, free from all reasonable suspicion of any design for himself or others, upon the estates or lives of any suspected criminals, or quarrels or controversy with any of them. They ought

* A nobleman is tried by his peers in cases of *treason* and *felony*, or misprision of the same; but in all misdemeanors, as libels, riots, perjury, conspiracies, &c. he is tried like a commoner by a jury. [3 Inst. 30. 2 Hawkins's Pleas of Crown, 424. See Clarendon's Remark on Trial of Peers, in Survey of Leviathan, p. 104.]

† More will be said hereafter respecting this most important doctrine.

to be indifferent and impartial, even before they are admitted to be sworn, and of sufficient understanding and estate for so great a trust.' He maintains, that 'the trust and power of grand juries is and ought to be accounted amongst the greatest and of most concern, next to the legislative.' And that, 'they are to search out the truth of such informations as come before them, and to reject the indictment if it be not sufficiently proved, and farther if they have reasonable suspicion of malice, or wicked designs against any man's life or estate by such as offer a bill of indictment, the laws of God and of the kingdom bind them to use all possible means to discover the villany; and if it appear to them, (whereof they are the legal judges,) to be a conspiracy or malicious combination against the accused, they are bound by the highest obligations upon men and christians, not only to reject such a bill of indictment, but to indict forthwith all the conspirators with their abettors and associates*. . . . . The jury," he observes, "ought to inquire after the witnesses, their condition and quality, their fame and reputation, their means of subsistence, and the occasion whereby the facts whereof they bear witness came to their knowledge." . . . . "Neither may the jury lawfully

* This doctrine is highly reasonable; and deserves great attention. When the *Indictment Bill* [48 Geo. III. c. 58.] was before the House of Lords, Lord Chief Justice Ellenborough, if I am not *misinformed*, observed, that a proceeding by information *ex officio*, was perhaps more advantageous to a person than a proceeding by indictment, because *a person accused has no means of punishing another for a false accusation before a grand jury, nor can he indict a witness who has given evidence before a grand jury for perjury;* but in regard to informations filed *ex officio*, by the Attorney General, they were, in practice, grounded on affidavits, and a person falsely accused might indict the person, making such affidavit, for perjury. It is plain, therefore, that grand jurors should be careful to do that justice, which cannot otherwise be obtained.

omit to inquire concerning the parties accused, of their quality, reputation, and the manner of their conversation, with many other circumstances; from whence they may be greatly helped to make right inferences of the falsehood or truth of the crimes whereof any man shall be accused. The jury ought to be ignorant of nothing whereof they can inquire, or be informed, that may in their understandings enable them to make a true presentment or indictment of the matters before them." . . . . "No directions can legally be imposed upon them by any Court or Judges." . . . . "It is," says Mr. Somers, "undoubtedly law which we find reported in Styles*, that though there be witnesses who prove the bill, yet the grand inquest is not bound to find it, if they see cause to the contrary."

In several parts of this tract, he with great force of argument strongly insists on secrecy in the examinations and inquiries of grand juries, and their obligation to it by their oaths. Mr. Somers observes, "The greatness and honour of a Prince consists in the virtue, multitude, wealth, and prowess of his people; and his greatest glory is, by the excellence of his government, so to have encouraged virtue and piety, that few or no criminals are to be found in his dominions. Those who have made this their principal aim, have in some places so well succeeded, as to introduce such a discipline and rectitude of manners, as rendered every man a law unto himself. As it is reported in the History of Peru, that though the laws were so severe as to make very small crimes capital, yet it often fell out, that not one man was put to death in a year, within the whole compass of that vast empire†. The King's interest and honour, is more concerned in the protection of the innocent, than in the punishment of the guilty." . . . . "The

* See Styles's Reports. † Garc. de la Veg. Hist. de los Incas.

law has not been less careful for the reputation of the subjects of England than for their lives and estates, and this seems to be one reason why in criminal cases a man shall not be brought to an open legal trial by a petit jury, till the grand jury have first found the bill." . . . . "If, for fear of being unworthily reproached as *ignoramus* jury men, obstinate fellows, that obstruct justice, and disserve the King, the grand jury shall suffer the judges or the king's counsel to prevail with them to indorse *billa vera* when their consciences are not satisfied in the truth of the accusation, they act directly against their oaths, oppress the innocent whom they ought to protect, as far as in them lies, subject their country, themselves, and posterity to arbitrary powers, pervert the administration of justice, and overthrow the government which is instituted for the obtaining of it, and subsists by it." . . . . "Few men," says Mr. Somers, "at first see the danger of little changes in fundamentals, and those who design them usually act with so much craft, as besides the giving specious reasons, they take great care, that the true reason shall not appear; every design therefore of changing the constitution ought to be most warily observed, and timely opposed; nor is it only the interest of the people, that such fundamentals should be duly guarded, for whose benefit they are at first so carefully laid, and whom the judges are sworn to serve; but of the King too, for whose sake those pretend to act, who would subvert them."

How just is this observation! It temperately steers between the opposite rocks of factious, anarchic principles, and slavish submissive tenets.

> No lawyer of prerogative; no tool
> Fashion'd in black corruption's pliant school—

Form'd 'twixt the people and the crown to stand
And hold the scales of right with even hand*.

Swift† says of lawyers, that "they of all others seem least to understand the nature of government in general," and the conduct of some lawyers of his time might countenance the observation. Those same sixteen serjeants, for instance, who on their call in 1683, gave rings with the motto, *A Deo Rex, a Rege Lex*, were well worthy of being scandalized, as lawyers who were ignorant of the constitution under which they lived, and with which, from their profession, they ought to have been better acquainted. Swift's observation did not apply to Mr. Somers: he sought no innovations, and encouraged no Utopian visions; his ideas of just government grew out of the old and venerable institutions of his country. As Addison remarks of him, "his principles were founded in reason, and supported by virtue; and therefore did not lie at the mercy of ambition, avarice, or resentment‡." He resembled Cicero in many of the leading and distinguished characteristics of that great man; and we may observe, from what has already been related of him, and more especially from the sequel of this work, how exactly the following passage, written by Middleton, the admirable biographer of Cicero, applies to Somers. "As to his political conduct, no man was ever a more determined patriot, or a warmer lover of his country than he; his whole character, natural temper, choice of life and principles, made its true interest inseparable from his own. His general view, therefore, was always one and the same; *to support the*

* See Lloyd's Law Student.

† 2 Vol. Swift's Works, Nichols's edition, p. 378.

‡ Freeholder, Number 39.

peace and liberty of the republic in that form and constitution of it, which their ancestors had delivered down to them†."

Let us now recur to the treatise of which I have already given such copious extracts. The following passage is so just, and so important, that I shall be excused giving it at length. "The jurors must first know the lawful grounds whereupon they may and ought to indict, and then what truly and justly ought to be taken for the ground of an indictment. The principal and most certain is the jurors personal knowledge, by their own eyes or ears, of the crimes whereof they indict: or so many pregnant concurring circumstances, as fully convince them of the guilt of the accused; when these are wanting, the depositions of witnesses and their authority, are their best guides in finding indictments. When such testimonies make the charge manifest and clear to the jury, they are called evidence, because they make the guilt of the criminal evident, and are like the light, that discovers what was not seen before: all witnesses for that reason are usually called the evidence, taking their name from what they ought to be: yet witnesses may swear directly and positively to an accusation, and be no evidence of its truth to the jury; sometimes such remarks may be made upon the witnesses, as well in relation to their reputation and lives, as to the matter, manner, and circumstance of their dispositions, that from thence the falsehood may appear or be strongly suspected: it is therefore necessary to know what they mean by a probable cause or evidence, who say that our law requires no more for an indictment. *Probable* is a logical term, relating to such propositions, as have an appearance, but no certainty of truth, shewing rather what is

* Life of Cicero, vol. 3, pp. 357, 8.

not, than what is the matter of syllogisms: these may be allowed in rhetoric, which worketh upon passions, and makes use of such colours as are fit to move them whether true or false; but not in logic, whose object is truth; as it principally intends to obviate the errors that may arise from the credit given unto appearances, by distinguishing the uncertain from the certain, *verisimile à vero*, it cannot admit of such propositions, as may be false as well as true, it being as impossible to draw a certain conclusion from uncertain premises, as to raise a solid building upon a tottering or sinking foundation. This ought principally to be considered in courts of justice, which are not erected to bring men into condemnation, but to find who deserves to be condemned, and those rules are to be followed by them, which are least liable to deception. For this reason, the council of the *Areopagites*, and some others of the best judicatures that have been in the world, utterly rejected the use of rhetoric, looking upon the art of persuading by uncertain probabilities, as little differing from that of deceiving, and directly contrary to their ends, who by the knowledge of truth, deserved to be led into doing of justice: but if the art that made use of their probabilities, was banished from uncorrupted tribunals as an hindrance unto the discovery of truth, they that would ground verdicts totally upon them, declare an open neglect of it; and as it is said, that *uno absurdo dato mille sequuntur*, if juries were to be guided by probabilities, the next question would be concerning the more or less probable, or what degree of probability is required to persuade them to find a bill: this being impossible to fix, the whole proceedings would be brought to depend upon the fancies of men, and as nothing is so slight but it may move them, there is no security that innocent persons may not be brought every day into danger and trouble.

By this means certain mischief will be done, whilst it is by their own confession uncertain whether they are any ways deserved, by such as suffer them, to the utter overthrow of all justice.

"If the word *probable* be taken in common, rather than in a nice logical sense, it signifies no more than likely, or rather likely than unlikely: when a matter is found to be so, the wager is not even, there are odds upon one side, and this may be a very good ground for betting in a tennis-court, or at a horse-race, but he that would make the administration of justice to depend upon such points, seems to put a very small value upon the fortunes, liberties, and reputation of men, and to forget that those who set in courts of justice, have no other business there than to preserve them."

The whole of this tract deserves repeated perusals*. By the 11 Hen. VII. chap. 3, power was given (except in treason, murder, or felony) to proceed without any indictment or presentment by a grand jury, upon a bare information for the King, before justices of assize and justices of the peace,

* The celebrated Mr. Dunning, (afterwards Lord Ashburton,) in his Letter on Libels, General Warrants, &c. p. 31, in note, calls this a "valuable treatise," "attributed," says he, "to Mr. Somers, who not only understood the Constitution, but loved it." Serjeant Wynne too, in his elegant and learned dialogues, intitled Eunomus, [3 vol. 263, 2nd edit.] (as classically written a law-book as ever was penned, but I am sorry to say, containing many great and important errors,) sanctions this tract of Somers's: "The accusation," says he, "in most criminal "cases, is by the grand jury, consisting of at least twelve persons of rank and pro-"perty, in the county where the fact arose: and it is made upon substantial pre-"sumptive evidence." And in support of this position he refers to this production, and intitles it, "an excellent tract." [4 vol. p. 183.] See also what Blackstone says on the subject. [4 vol. Commentaries, p. 302.] I have heard that Eunomus was printed but not published during the author's life, nor by his desire, after his death. He was aware, perhaps, of some of his mistakes.

who were intrusted to act at their discretion, upon proof before them by witnesses; but the nation soon felt the mischief of this act, and the loss of their precious fundamental law, and by the 1 Hen. VIII. cap. 6, it was happily repealed*.

The reasons given by Mr. Somers for not *publicly* examining witnesses before a grand jury, were unanswerable; and since Lord Shaftesbury's case a public examination has never been practised.

The several tracts we have noticed, evinced much reading, much judgment and taste, and a happy talent for composition. *Non servili animo concepit.*

These excellent treatises, together with some others of the kind, operating on the rising spirit of the times, served to check the progress of that guilty despotism, which at this period, threatened to prostrate all the fences of liberty, and helped to mature that noble spirit of resistance to monstrous oppression, which at length terminated in the Revolution. "Few men," says Mr. Dunning in his tract, before alluded to, "know much of the nature of polity, and of them, all do not sufficiently attend to the conduct of administration, to observe when slight innovations are made in the laws or in their administration, and of those who do, very few indeed have that degree of understanding which enables them to judge soundly of the consequences of such alterations, with respect to their liberties in general. Again, of these, very few, not more than one perhaps has activity, resolution, and public spirit enough to publish his thoughts, as Mr. Somers did, upon several occasions, concerning what was going forward, in order to alarm,

* See Co. 4 Inst. p. 41.

(like a good citizen,) the rest of his fellow subjects*." A contemporary of Somers, in a letter to Dr. Birch, has justly characterized the tracts written by him. "Natural strength and clearness of understanding, was the distinguishing peculiarity which appeared in all his performances. Every thing was correct, pure, and proper†."

In the same year (1681) were published, Mr. Somers's *Translations from Ovid*, in which considerable learning and genius are discernible.

These translations consist, of the moving Epistles of *Dido to Æneas*, and of *Ariadne to Theseus*. The subject of these Epistles, it is well known, exercised not only the muse of Ovid, but also the plaintive and impassioned genius of Catullus. The translation of Dido's Epistle, is, for the most part, a faithful and elegant representation of the original. Compositions in verse had not then obtained all that easy flow and harmony which Pope afterwards imparted to them; and occasionally, it must be owned, Mr. Somers is somewhat prosaic, and not sufficiently spirited; and Dryden's translation of the same Epistle, must be confessed to be deserving of superior praise; but, in some parts, I think, Mr. Somers has shewn a felicity of expression, equal even to Dryden.

The following lines may serve as a specimen of the translation of this poem:—

> "With cruel haste to distant lands you fly,
> You know not whose they are, nor where they lie.
> On Carthage and its rising walls you frown,
> And shun a scepter which is now your own;
> All you have gain'd you proudly do contemn,
> And fondly seek a fancy'd diadem.

* Letter on General Warrants, &c. † Birch's MSS. Brit. Mus.

And should you reach at last this promis'd land,
Who'll give its power into a stranger's hand?
Another easy Dido do you seek,
And new occasions new made vows to break?
When can you walls like ours, of Carthage build,
And see your streets with crowds of subjects fill'd?
But tho' all this succeeded to your mind,
So true a wife no search could ever find.
Scorch'd up with love's fierce fire my life does waste,
Like incense on the flaming altar cast;
All day Æneas walks before my sight,
In all my dreams I see him ev'ry night:
But see him still ungrateful as before,
And such as, if I could, I should abhor.
But the strong flame burns on against my will,
I call him false, but love the traitor still."

The translation of the Epistle of *Ariadne to Theseus*, is subject to nearly the same observation. It cannot, indeed, be compared with Dryden's translation, for Dryden did not translate it. Never was there a happier subject for a poet.

The concluding lines of this poem do not badly express the pathetic turns of the original:—

"Sprung sure from rocks, and not from human race!
Thy cruelty does thy great line disgrace.
Yet could'st thou see, as barb'rous as thou art,
These dismal looks, sure they would touch thy heart.
You cannot see, yet think you saw me now
Fix'd to some rock, as if I there did grow,
And trembling at the waves which roll below.
Look on my torn and my disorder'd hairs,
Look on my robe, wet through with show'rs of tears.
With the cold blasts see my whole body shakes,
And my numb'd hand unequal letters makes.
I do not urge my hated merit now,
But yield, this once, that you do nothing owe.

I neither sav'd your life, not set you free:
Yet therefore must you force this death on me?
Ah! see this wounded breast worn out with sighs,
And these faint arms stretch'd to the seas and skies;
See these few hairs yet spar'd by grief and rage,
Some pity let these flowing tears engage.
Turn back, and, if I'm dead when you return,
Yet lay my ashes in their peaceful urn."

The poetry of Mr. Somers, certainly does him great credit, and exhibits a very elegant genius, but his poetry alone, whatever his flatterers might urge, would never have immortalized his name. It is said, however, to have acquired him distinction.

I think I see the grey beards of his day, and even the *grave apprentices* of the common law of the present day, shaking their heads at Somers, as a wit, and exclaiming against the cultivation and indulgence of his poetical genius; for it seems to have been a very old notion that lawyers should study nothing but law. For this reason, it was, I suppose, that Erasmus, in a letter to Sir Thomas More, terms the profession of the law, *professio a veris literis alienissima*, and as to the law itself, he terms it, "*nihil illiteratius**," and says, in excuse of More's aversion to the profession, "*ab hoc cum non injuria abhorret adolescentis ingenium, melioribus rebus natum*, &c†. In excuse, however, of Mr. Somers's poetic amusements, it should be remembered, that he was not yet called to the bar, and had considerable leisure, and that the indulgence of this turn of mind had been recommended as useful, by many eminent characters. Cicero, a lawyer as well as an orator and a statesman, amused himself with poetry, though his attempts

* Ciceron. Dial. † Erasm. Epist. 447, ad Huttenium.

were not of the happiest kind; and Plutarch, probably, is too lavish in his praises of him in that respect. Pliny, in his Epistles, repeatedly intimates how much he loved, and read, and wrote poetry*; and he justifies himself against the charge of misemploying his time, by citing a long list of eminent men, who indulged themselves in this elegant and rational recreation, such as, M. Tully, C. Calvus, A. Pollio, M. Messala, Q. Hortensius, M. Brutus, L. Sulla, Q. Catullus, Q. Scævola, V. Sulpitius, Varro, the Torquati, C. Memmius, Lentulus, Gætulicus, A. Seneca, Lucceius, Rufus, Julius Cæsar, Augustus, Nerva, Titus, &c†. In a letter to Fuscus‡, a young lawyer, whose studies he was directing, we find the following sensible passage, "*Fas est et carmine remitti, non dico continuo et longo, (id enim perfici nisi in otio non potest,) sed hoc arguto et brevi, quod apté quantaslibet occupationes curasque distinquit.*"

Horace, thus addresses his friend Julius Florus:—

----------non tibi parvum
Ingenium, non incultum est, nec turpiter hirtum.

* Plin. Epist. Lib. 4, Epist. 14. *Ib.* Lib. 5, Epist. 3. *Augurinus*, it seems, was very high in his admiration of Pliny's poetic talent, as appears from his verses on Pliny—

Canto Carmina versibus minutis,
His olim quibus, et meus Catullus.
Et Calvus, veterisque. Sed quid ad me?
Unus Plinius est mihi, prives
Mavult versiculos, foro relicto,
Et quærit quod amet, putatque amare.
Ille O Plinius, ille quot Catones!
I nunc quisquis amas, amare noli.

[C. Plin. Epist. Lib. 4, Epist. 27. Edn. Longolii.]

† Vid. Plin. Epist. Lib. 5, Epist. 3.

‡ Plin. Epist. Lib. 7, Epist. 9.

Seu linguam causis acuis, seu civica jura,
Respondere paras; seu condis amabile carmen.

In more modern times, great lawyers have diverted themselves by poetic efforts. Sir John Davies, an eminent lawyer, was a poet of very considerable merit. Lord Chancellor More wrote verses*, and Wharton says, that the Lord Chancellor Hatton was the undoubted writer of the fourth act of the old tragedy of *Tancred and Gismund*†.

Lord Clarendon, and Sir Mathew Hale, (a name dear to every lawyer,) attempted to write poetry; and these attempts clearly evince that they did not think it below their dignity, or the dignity of their profession, to write poetry; but it must be owned, that some of these law poets, and particularly Hale, were as miserable composers as can be conceived. They loved the Muses better than the Muses loved them. Bacon too, says a biographer of his, "forsook for a while, the thorny tracks of science, philosophy, and jurisprudence, to tread the primrose path of poesy, though none of his biographers, (Aubrey excepted,) notice it. Several poems of his are extant. Aubrey's words are, "Lord Bacon was a good poet, but concealed, as appears by his letters‡." It is impossible to read any of his eloquent and instructive writings, without perceiving, that in

* History of English Poetry, vol. 3, p. 97, &c. Ib. vol. 2, p. 376, n. g.

† This play is said to have been the joint production of five students of the Inner Temple, and was acted at that society before the Queen, in 1568, but not printed till 1592. It is to be found in the 2nd edit. of Dodsley's Old Plays. It was founded on a story in Boccacio, which is related by Dryden in his Fables, under the title of Sigismunda and Guiscardo. Mrs. Centlivre took the same story for the basis of her tragedy, called, the "*Cruel Gift*." [Biog. Dram. vol. 2, p. 363.]

‡ See Walpole's Catal. of Royal and Noble Authors, augmented by Parke, 2 vol. p. 205, 208.

addition to his vast reasoning powers, Nature had bestowed upon him a rich, poetic mind.

The Lord Chancellor Harcourt was a poet; his admirable verses addressed to Mr. Pope, on the publication of his works, exhibit a distinguishing proof of his genius*. Lord Mansfield was a poet, and so good a one, that Pope said or sung of him, when he adopted his lawyer's gown,

> "How sweet an Ovid, Murray was our boast."

And in another place, Pope again alludes to him;

> "The Temple late two brother serjeants saw,
> "Who deemed each other oracles of law;
> "With equal talents these congenial souls,
> "One lull'd the Exchequer, and one stunn'd the Rolls:
> "Each had a gravity, would make you split,
> "And shook his head at Murray as a wit."

An extemporaneous addition to Lord Lyttleton's poem of "*Virtue and Fame*," by Lord Chancellor Hardwicke, had so much merit, as to induce the former to observe, "if your Lordship can write such verses *extempore*, it is well for other poets that you chose to be Lord Chancellor rather than Laureat†." This talent of his, it seems, descended; for Charles Yorke, "the all accomplished" Charles Yorke, was a poet. Some beautiful proofs of his poetic genius have been given to the world‡. He used to call himself, says Dalrymple, "*a*

* Warburton printed them in the first vol. of his octavo edition of Pope's Works.

† See Lord Lyttleton's Life, and Lord Orford's Royal and Noble Authors, by Parke, vol. 4. p. 332.

‡ See some of his Poetry addressed to his sister, Miss Yorke, (afterwards Lady Anson,) in the Annual Register for the year 1770.

Fugitive from the Muses," and amidst his vast variety of business, he still sacrificed to them in secret*. So also, the great commentator, Blackstone, was a poet. Before he was of age, he published a work intitled "*The Pantheon,*" in which a tutor is represented as conducting his pupil through the different religions which have prevailed in the world, and fixing him at length in the Christian religion. His poem, intitled "*The Lawyer's Farewell to his Muse,*" written on his entering at the Temple, has always been esteemed an admirable specimen of his poetical genius. His verses too, on the Death of his present Majesty's Father, evince considerable genius†, and his notes on Shakspeare shew how intimate he was with that immortal poet. The late Sir William Jones was a beautiful poet as well as a lawyer and scholar. It cannot be denied, that few gold mines have been discovered in Parnassus; and that he who looks for fortune, must not court such unendowed virgins at the Muses; but they are too severe, who suppose with the rigorous lawyers of old, that a man cannot be somewhat of a poet, or a reader of poetry, and a lawyer too‡. The in-

* See Pref. to Dalrymple's Memoirs.

† This Poem was first printed in the "*Epicedia Oxoniensa in obitum celsissimi et desideratissimi Principis Walliæ, Oxon*, 1751," under the name of James Clitherow, Esq. See Clitherow's Pref. to Judge Blackstone's Rep. p. 6, and see also Gent. Mag. vol. 51, p. 335.

‡ Boileau says,

"Si l'or seul a pour vous d'invincibles appas,
"Fuyez ces lieux charmans qu'arrose le Permesse;
"Ce n'est point sur ses bords qu'habite la richesse."

[L'Art Poetique, Chant. 4.]

Locke copied, or hit upon the same thought, and improved it. "It is seldom seen that any one discovers mines of gold or silver in Parnassus. It is a pleasant air, but a barren soil." [Locke, on Education, p. 80, folio edit.]

stances I have given, (not to insist on great living characters,) do manifestly refute the assertion. If, indeed, a lawyer makes poetry, not the relaxation and amusement, but the constant care, and as it were, the business of his life, then indeed he must not pretend to call himself a lawyer. If like Ranger, in Hoadley's "Suspicious Husband," he runs altogether from the loathsome black letter, into the arms of the Muses, he must expect Ranger's fate. If he suffers the Muses to gain such an ascendancy over him, as they did over Chaucer, over Petrarch, Boccacio, Ariosto, Tasso, Corneille, Moliere, Boileau, Gray, West, and others that might be named, (a long train of illustrious men intended originally for the law,) like them, he must bid adieu to the law as a profession. It cannot, as Pliny observes, in the passage before quoted, be expected of a lawyer, that he should engage his mind in poems of any length (since great leisure is necessary to perfect them) but only in short performances; "*arguto et brevi.*"

A complete orator must necessarily be somewhat of a poet. To be in the first rank of orators, the mind must be tinged, in a great degree, with the ardour and fancy of the poet. The orator, as well as the poet, must be born such; and the old saying, "*poeta nascitur, orator fit,*" is, as far as relates to an orator, an old untruth, and as much a vulgar error, as any that Sir Thomas Brown detected. How, otherwise, is it to be expected, that we should find that sensibility—that enthusiastic love of truth—and all those beautiful figures, and bold touches, which seize, controul, and transport the mind? such powers are beyond the reach of art. Art has often improved, but never did it create an orator. Art never gave genius—art never gave sensibility, the most precious of all the materials of an orator, and a poet—art never gave a musical

ear—art never bestowed taste, nor voice, nor memory.—"Poetry," says Spenser, (and the same may be said of eloquence,) "is a divine gift and heavenly instinct, not to be gotten by labour and learning, but adorned with both, and poured into the witte by a certain enthusiasmos and celestial inspiration."

If Sir Edward Coke would not, or could not, write poetry*, the quotations scattered in his works demonstrably evince, that he had, at least, read the poets. Somewhere, he triumphantly boasts, that he had quoted Virgil three hundred times! The reader of the rugged prose of Sir Edward Coke, will not easily conceive that he was enamoured of the

* On one occasion, it seems he wrote poetry, but we cannot much admire either the matter or the manner of his production. In a note to Dr. Birch from the Hon. Charles Yorke, dated Oct. 2, 1769, he says, amongst other things, "At Holkham I found Sir F. Bacon's present book of the *Novum Organum*, intitled, *Instauratio Magna*." [Ed. Joan Bell, 1620.] "To Sir Edward Coke."—At the top of the title page in Sir Edward Coke's hand-writing, *Edward C. ex dono Authoris.*

Auctori consilium.
Instaurare paras, veterum documenta sophorum
Instaura legis, justitiamque prius.

"You know the book was published in October 1620, a few months before the impeachment. The verses not only reprove Sir F. Bacon for going out of his profession, but allude to his character as a prerogative lawyer and his corrupt administration of the Chancery.

"Over the device of the ship passing between Hercules's Pillars are written two English verses not so good as the Latin distich. These are also in the handwriting of Sir Edward Coke.

"It deserveth not to be read in schools,
But to be freighted in the *Ship of Fools*."

"I think that *Du Bartas* wrote a satire on bad authors in that age called the Ship of Fools. The conceit refers to that book." [Birch's MSS. 4325. Brit. Mus.]

graceful turns and engaging sweetness of the poets. If he had mellowed his style by the reading of them, he would have had example, as well as precept on his side. Demosthenes imitated Homer, and so did Plato; and Quintillian recommends their example. Demosthenes, we are also told, deeply studied the sublime and tender muse of Euripides. Cicero too, was an equally ardent admirer of that exquisite author. When the murderers approached to extinguish his life, they found him contemplating adversity, with the Medea of Euripides in his hand! That learned and noble minded lawyer, Selden, appears to have read and patronised poetry. The poet Herrick, acknowledges his patronage, in a poem addressed "*to the most learned, wise and arch antiquary*, Mr. John Selden." The celebrated *Grotius*, amidst all his serious studies, and public occupations, never relinquished the Muses. In a letter to Gronovius*, he says, that he unbended himself at times, after his weightier business, in the company of the Muses; and in a letter to Freinshemius† he writes, "however much I am busied I still preserve my affection for the Muses, and look upon them as the most agreeable of all amusements." Thuanus, a magistrate and also an historian, delighted in poetry and in the composition of it, and so too he tells us‡ did that great French lawyer, Michael de L'Hopital, to whom Lord Somers was compared by Walpole. Gravina too, an eminent Civilian, is well known for the tragedies he composed, after the model of the Greeks.

D'Aguesseau has well expressed himself, respecting the

* Epis. 378. † Epis. 915.

‡ Vid. Thaun. lib. 56. Anno 1583.

occasional studies of a lawyer. "*Que les anciens orateurs lui donnent leur insinuation, leur abondance, leur sublimité; que les historiens lui communiquent leur simplicité, leur ordre, leur variété; que les poëtes lui inspirent la noblesse de l'invention, la vivacité des images, la hardiesse de l'expression; et sur-tout ce nombre caché, cette secrete harmonie du discours, qui, sans avoir la servitude et l'uniformité de la poésie, en conserve souvent toute la douceur et toutes les graces**."

A classical and poetical turn of mind in a lawyer administers refreshment to him after more abtruse studies, and abates the vulgar fevers created by the ordinary and unavoidable irritations of life; and prevents that contraction and ossification of the heart, which the crabbed study of *contingent remainders, executory devises, springing uses*, and such like abtruse and abstract science has a tendency to create. Though law, as Mr. Burke observes, be "one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together, yet it is not apt, except in persons very happily born, to open and to liberalize the mind, exactly in the same proportion†."

But though pleased with the example of Mr. Somers, as well as the sanction of others‡, I have thus endeavoured to vindicate a turn for poetry in a lawyer, and presume to recommend the occasional reading of the poets, as assistant to eloquence,

* Œuvres de M. Le Chancellier D'Aguesseau, 3 Discours.

† Vid. Speech on American Taxation, April 19, 1774, p. 47.

‡ There is on this subject, the advice of one of the wisest of men, the late *Charles James Fox*, who, in a letter to a *young lawyer*, uses the following language. 'Now that you are settled in Dublin, *and hard at it with the law*, I ought not, according to common notions, to answer your questions about Æschylus, &c. *but*

as well as a delightful recreation, yet I would anxiously observe, that such reading should not be allowed to soften the mind, and withdraw it into solitude; and that care should be taken that a sterling manliness of thought and expression is not exchanged for finical graces, and an unmeaning love of sound. The laboured prettinesses of Isocrates, cannot be put in competition with the majestic strength of Demosthenes. *To convince*, is or ought to be a rhetorician's chief care; *to please* is but a subordinate object, and only to be aimed at, the more effectually to convince. It was an axiom of Lord Bacon that words should wait on things, rather than things on words; and his opinion was, "that all affected elegance was below the gravity and majesty of a public discourse." This is well deserving of continual remembrance, though Bacon himself did not always remember it. Nor must poetical studies be allowed to usurp those hours that belong to law. If a lawyer cannot find time to devote six hours of the day to law, he should have nothing to do with the poets. There is justness in what Ben Jonson (amongst other things) says, in the Dedication of his "*Every Man out of his Humour.*" "*To the noblest nourceries of humanity and liberty, in the kingdome: The Innes of Court.*" "I command," says he, "it ly not in the way of your noble and useful studies to the publick. For so I shall suffer for it: but when the gowne and cap is off; and the Lord of libertie reignes; then, to take it in your hands, perhaps may make some bencher, tincted with humanitie, read: and not repent him."

It may be exclaimed, how is time to be found for these

I am of opinion, that the study of good authors, and especially the poets, ought never to be intermitted by any man who is to speak or write for the public, or, indeed, who has any occasion to tax his imagination, whether it be for argument, for illustration, for ornament, for sentiment, or any other purpose." [Vid. Trotter's Memoirs, &c. p. 519.]

pursuits? The complaint is groundless. All excellence as an orator, a lawyer, or a writer, is the result of much meditation and solitary labour; but, "Where love is, there is no labour or the labour is loved." A man must project, and hope, before he can acquire; but when once an ardent thirst for excellence is excited; if glory, "*the flame of most erected spirits*," agitates his mind, then it is that labours become pleasures; study then is pursued, not coldly as a duty, but warmly and constantly, and with all the vigour of a passion. Such a student, like the Athenians, as described by Thucydides*, has no other notion of a festival than of a day whereon some needful point should be accomplished; and to him, as to them, inactive rest is more a torment than laborious employment. "*Volenti nihil arduum.*"

How did Cicero find time to serve his friends and the republic, and yet pen works which have since become the study and delight of every succeeding age? An answer may be given in his own words: "*Quare quis tandem me reprehendet, aut quis mihi jure succenseat, si, quantum cæteris ad suas res obeundas, quantum ad festos dies ludorum celebrandos, quantum ad alias voluptates, et ad ipsam requiem animi et corporis conceditur temporis: quantum alii tribuunt tempestivis conviviis: quantum denique aleæ, quantum pilæ; tantum mihi egomet ad hec studia recolenda sumpsero†?*" In some of the charming letters of the younger Pliny‡, we find him describing the course of his life, and we there see with what constant and anxious labour he toiled on to glory. "Glory is not to be acquired but by labour; otherwise, it would cease to be glory." How was it that *Bacon*, who to use the words of Spratt, "had run through all the degrees of a profession which usually takes up men's whole time, who had studied, and practised, and governed,

* Thucyd. book 1. † Oratio pro Archia Poeta.

‡ Vid. Plin. Epist. Lib. 9, Epis. 36, 40.

the common law, who had always lived in the crowd, and borne the greatest burden of civil business, should yet find leisure enough for these retired studies, to excel all those men who separate themselves for this very purpose*." How was it that *Grotius* found time to transact public affairs, write grave and learned works that have immortalized his name, and yet find time for the cultivation of the Muses? They reflected on the swiftness of time, and the necessity of well employing it. How Mr. Somers allotted his time in his youth, we are not informed, but in his more advanced age, it is said†, "a few hours of sleep sufficed him, and at waking, a reader attended, and entertained him with the most valuable authors." It would seem, he thought with Bishop Jeremy Taylor, that three hours sleep was sufficient. The idle envy, those on eminences above them, but do they envy them their toils and sacrifices? Let them pay the price of glory, and they may obtain it. The ardent South, has pointed his eloquence against the slothful, yet envious and ambitious man! Adverting to idleness, he thus exclaims; "This often makes men envy the high offices, honours and accomplishments, of others, they will not be at the pains to fit themselves for preferment, and yet malign those who have it for their fitness, and owe that fitness to their pains; no, they would lie still and be great, sleep or play and be learned, honours and dignities must come to their bed-side, wait the time of their rising, (forsooth,) and even court their acceptance. But Nature and Providence has cast the course of things much otherwise, and honour and greatness will wait upon none, but such as first wait upon them, which men must

* Spratt's History of the Royal Society, part 1, sec. 16, p. 35, 36.

† Anecdotes of distinguished Persons.

not think to do by laying and sleeping: for, as wisdom generally brings men to honour, so study and labour must bring them to wisdom; and the way to be wise is to consult their pillow less. Industry, for the most part, opens the way to preferment, but always to improvement, and it is the sweat of the brow that entitles it to the laurel*."

In 1682, Mr. Somers quitted college†, and as it is said in the Biographia Britannica‡, without taking any degree; but that is a mistake; he did take a degree. In a letter I have seen, written from Trinity College, by Dr. Thomas Warton, the historian of English Poetry, dated Feb. 4, 1786, there is the following passage: "Turning over some old papers, in our College Bursary, I find a Latin epistle from Lord Somers, (in his own hand,) to the president Dr. Bathurst, supplicating for the degree of *Master of Arts;* whether he had that degree I cannot say, but he certainly must have been *Bachelor of Arts*, before he could make such an application. . . . . He not only took one degree, but stayed here seven years‖." Mr. Cooksey says, "he had seen some of Mr. Somers's exercises whilst at college, and that they were not any way remarkable§;" but in another letter of Warton's, he says, "I have heard the late Mr. Wise, Radclivian Librarian, and a fellow of Trinity College, (a very old man,) say, that Dr. Bathurst, the president, had preserved many of Somers's exercises in Latin verse, which were exceedingly ingenious, and which Bathurst much valued¶."

* South's Sermons, vol. 2, p. 3.

† Lib. Caution. Coll. Trin. Oxon. Number 1, fol. 23.

‡ Biogra. Brit. tit. Somers.

‖ This letter was directed to the late Isaac Reed, Esq. and is now in the possession of John Townley, Esq. who favoured me with a sight of it, and of some other letters, relating to Lord Somers. § Cooksey's Life, &c.

¶ See MS. letter to Mr. Reed, dated from Trinity College, Oxon, February 4, 1782, in the possession of John Townley, Esq.

It does not appear that Mr. Somers devoted himself, in any degree, to that useful man-science, the mathematics. Possibly, like West, Gibbon, and others, he had "a great respect for your connoisseurs that way, but was contented to be their humble admirer*."

The defects of the Universities have not been unobserved. Long ago, Bacon†, amongst others, descried and lamented them; and Clarendon felicitated himself on his escape from them‡. Swift and Smith, and Rousseau and Gray, and Gibbon, are noted for their raillery concerning them; but, let it always be remembered it is not the *institution* against which they inveigh, but its *abuses;* the Universities should not be, and indeed are not, what Junius, in a moment of false reasoning, said they should be, "a peaceful scene of slumber and thoughtless meditation§!" Some few additional regulations may be wanting. There is too much of ruinous extravagance, and too lax a discipline. In the great public schools, the seeds of indiscretion are sown, and at the Universities they are but too apt to shoot forth into a wild and destructive excess. A parent is compelled, in prudence, to pause before he sends his child to an University; for he sees, that an ardent spirited youth, who, if properly managed, is, of all others, the best suited for the attainment of excellence, is surrounded with a thousand ruinous temptations and snares. The heads of colleges, as well as parents, would do well to make use of a hint, which the author of the State Worthies, in his Life of

* See West's Letter in Mason's Life of Grey, p. 14. The late Mr. Fox, it appears, had not applied his mind to mathematics, *but he regretted it.* [See Trotter's Memoirs of Fox, preface, p. 18.]

† Bacon's Works, vol. 2, p. 453, folio edit.

‡ Life of Lord Clarendon, 1 vol. p. 7. § Letter 15.

Sir Thomas More, affords, "The college kept him strict, and his father short, so that, (as he blessed God afterwards,) he had neither the leisure or the means to be wicked*."

A proposal was made to King William, of visiting the Universities by a royal visitation, and Somers, who was then Lord Chancellor, seconded the idea; but Lord Chief Justice Holt, being of a different opinion, the project was defeated; the King observing, "that, if they could not agree it to be a clear case, he would not meddle with it." It was contended at that time that, whatever abuses, corruptions, or deviations from statutes, had crept into the University through neglect or length of time, they might in a great degree be reformed by strict injunctions from the Court upon each particular, to the visitors and heads of houses, besides the peculiar authority the Crown may have in several colleges of which its predecessors were the founders. Dean Prideaux, insists, with much excellent argument, upon the necessity of new regulating the Universities†, and has, himself, proposed regulations, which, with some few corrections, might be very serviceable. A distinguished lawyer, and a most excellent man, Lord Chief Justice Wilmot, observed and lamented the want of some regulations in the Universities. "I have long been, (says he,) a warm advocate for our Universities, and for that reason perhaps, have been too rigid and severe a disciplinarian, for their existence depends upon the activity and honour of the tutors and heads of houses, and whenever there is a total relaxation of discipline, if they either do not take care to know, or whenever they connive at idleness, the *Parliament* must and

* State Worthies, p. 43.——The same anecdote is also mentioned in More's Life of his relation, Sir Thomas More.

† Life of Dean Prideaux, with several tracts and letters.

ought to take the reformation of them in their own hands, and attempt to rescue the rising generation from vice and ignorance, by some new system of academical government." The subject is most interesting, for as is the education, so in general, will be the public and private virtue of individuals*.

Dr. Bathurst, the President of Trinity College, always boasted with singular satisfaction of the education "of so learned and eloquent a lawyer, so sincere a patriot, and so elegant a scholar as Lord Somers†." The same College, among the statesmen, poets and scholars, enrolled in its lists, records not only the name of Lord Somers, but that of the celebrated Lord Chatham, not to mention other living worthies. The College was founded by Sir Thomas Pope, in the year 1554, and in the constitution of this society, he principally inculcates the use and necessity of classical literature: and recommends it as the most important and leading object in his system of academical study. For this purpose, he desires that the students be taught to acquire a just relish for the graces and purity of the Latin languages, and be enabled to explain, critically, *the Offices, de Oratore* and *Rhetoric Treatises of Cicero*, the *Institutes of Quintilian, Aulus Gellius, Plautus, Terence, Virgil, Horace, Livy*, &c. Such then, probably, were

* See an admirable discourse on the Universities, by the anonymous author of the Pursuits of Literature, p. 327, in which their great importance to the nation is most eloquently insisted upon. See also what Dr. Parr has so justly and so feelingly observed upon the subject, in his notes to the Spital Sermon, p. 107.

St. Pierre somewhere says, it would be an easy task to demonstrate, that the most celebrated writers in every walk of literature, were not educated at college, from Homer, who was acquainted with no language but his own, to John James Rousseau, who was a very indifferent scholar. The observation applies more properly to France than to England.

† 4 Vol. Walpole, 78.

the studies of Mr. Somers; such were the pure and delightful sources of eloquent wisdom, from whence he acquired or improved, the strength and colour of his mind.

Gibbon observes that, "in the familiar society of Cicero and Livy, Petrarch had imbibed the ideas of an ancient patriot*, and alluding to Petrarch's friend, Rienze, he tells us, "The study of history and eloquence, the writings of Cicero, Seneca, Livy, Cæsar, and Valerius Maximus, elevated above his equals and contemporaries, the genius of the young plebeian." So it may have been with Mr. Somers. The flame of liberty was probably first kindled in his mind, or at least nursed and increased by the noble and generous lessons he had imbibed, and to the liberal studies of Trinity College, we undoubtedly owe, in a great degree, the splendid exertions of the patriotic Somers. Such studies are recommended by Milton, as proper for youth, for thereby, says he, "they become inflamed with the study of learning, and the admiration of virtue; stirred up with high hopes of living to be brave men and worthy patriots, dear to God and famous to all ages†."

Dr. Thomas Warton, in his "*Triumph of Isis*," and also in his verses addressed to Mr. Pitt, (afterwards Lord Chatham,) on the death of George II. alludes, in complimentary terms, to the circumstance of Somers having been a student of Trinity College; the same college in which Mr. Pitt, the particular object of his panegyric, had been educated.

"From that calm bower, which nurs'd thy thoughtful youth,
"In the firm precepts of Athenian truth;

* 12 Vol. Gibbon's History, p. 329, octavo.

† See Milton on Education.

"Where first the form of British liberty
"Beam'd in full radiance on thy musing eye;
"That form sublime, whose mien with equal awe,
"In the same shade, *unblemished Somers* saw."

Mr. Somers was devoted to his profession, and had obtained the character of a rising lawyer. His fine taste had not diverted him from legal studies. It was to him, probably, to whom Addison, (who knew him well,) alludes in his Spectator. "I have heard," says he, "one of the greatest geniuses this age has produced, who had been trained up in all the polite studies of antiquity, assure me, upon his being obliged to search into several rolls and records, that notwithstanding such an employment was at first very dry and irksome to him, he at last took an incredible pleasure in it, and preferred it even to the reading of Virgil or Cicero*.

In the year 1683, Mr. Somers, acted as one of the counsel for *Pilkington* and *Shute*, Sheriffs of London, *Cornish* and *Bethel*, Aldermen, together with *Ford Lord Grey*, of Werk, *Sir Thomas Player* and *Mr. John Jekyl*, (father of the famous Sir Joseph Jekyl†,) and others. It is the first cause in which I find him engaged. Foiled, as the Court had been, in the information against the *Earl of Shaftesbury*, it had recourse to other measures to secure its ends. When causes within the district of London are tried, the Sheriffs of London summon the juries; so that it was imagined, that if the Court could influence the

* Number 447.

† Sir Joseph Jekyl was one of the most correct and conspicuous Whigs. He was a fellow student of Mr. Somers, at the Temple, and afterwards married his sister. Under the auspices of his friend, he was appointed *Master of the Rolls*, and discharged the arduous duties of his post, with a lasting reputation. The authority of his decisions is very great.

choice of sheriffs, it might also make sure of the juries. The charter of the city vests the right of electing the sheriffs in the Common-hall, but it had been the usual practice, (with some exceptions,) to elect as one of them, that person whose health had been drank by the Lord Mayor. The Court, with sinister views, persuaded *Sir John Moore*, the mayor, to claim as a right, what had heretofore been conceded as a courtesy. This claim the citizens determined to resist; and accordingly, when the period for the election of sheriffs arrived, they asserted their chartered right of electing the Sheriffs. The Mayor, in a rage, adjourned the election, but the Sheriffs still continued the poll, and some riotting ensued. Upon this, prosecutions were commenced against the above mentioned persons, in respect of these riots*.

When the jury appeared who were to try the information, Mr. Somers rose, and challenged the array; a proceeding, that much irritated Sir Edmund Saunders, the Chief Justice, who vented his ill nature in a very unseemly manner. The propriety of this challenge was much argued, but Mr. Somers took no part in the argument, nor does it appear he took any other part whatever during the trial.

The ground upon which the challenge was supported, by the coadjutors of Mr. Somers was, that inasmuch as the information set forth that the Lord Mayor had a right of adjourning the poll when there was an election for Sheriffs, if in truth he had not that right, it could be no riot according to the information, and if that adjournment was not legal, then the Sheriff who summoned the jury in this case and was chosen at the adjourned meeting, never was Sheriff of London; and as this point,

* See 3 vol. State Trials, p. 630, Hargr. edit.

whether he was legal Sheriff was in issue upon this trial, it was therefore a trial in which he had an *interest*, and for that reason *he* ought not to have returned the jury, but that properly the *Coroner* should have returned it, since it is a doctrine of the law, that if a Sheriff is interested in point of title, the Coroner, and not the Sheriff, ought to return the jury. On the other hand, it was argued by the Attorney General, that in this case there was nothing in question but a fine to the King. He admitted, that where lands are in question, as in ejectment, if the Sheriff be interested in the land, in that case it is a good challenge. He also urged, that the information did not depend merely upon the legality of the adjournment, but was also grounded upon the outrageous assault upon the Mayor, which the legality or illegality of the adjournment could not excuse. The Lord Chief Justice* would not allow the challenge; the trial therefore went on, and the defendants were found guilty. When brought up for judgment, arguments were used by all the defendants counsel, except Mr. Somers, in mitigation of the fines; but they were very severely fined. Why Mr. Somers was silent on this occasion, or why, when the defendants were tried, he did not argue the validity of the challenge which he himself had made, I cannot divine.

The conduct of the Sheriffs on this occasion, is supposed to be alluded to by Dryden, in his Play of the *Duke of Guise*, in that part, where he introduces the *Echevins* or Sheriffs of Paris. The judgment was afterwards reversed in parliament,

* See the curious anecdotes of this judge given by North, in his amusing Life of the Lord Keeper Guildford. Saunders left some excellent Reports behind him; so much so, that it is said Lord Mansfield styled him, the *Terence* of Reporters.

(1 Wm. and Mary,) and the defendants petitioned King William that they might be repaid the fines levied on them, and that the prosecutor and judges might be excepted out of the then intended Act of Grace*. The Act of Grace, however, passed in the Second of William and Mary, but no such exception appears†. We thus see that as the first work Mr. Somers published was in support of the liberties of the people, so the first time his voice was heard in the court, it was on behalf of the "good old cause," and we shall find, that all through life, the love of his country beat at his heart, and directed his conduct. From this time Mr. Somers's practice increased daily, and it is said, that he got 700*l.* a year in King James the Second's Reign.‡

Business did not wholly estrange Mr. Somers from the pursuits of literature, and we are now to contemplate him in the pleasing character of a *patron*. "He was," says Lord Orrery, "the general patron of the *Literati*§." At this time, he patronised a magnificent folio edition of Milton's Paradise Lost.

* See the Petition, 3 vol. State Trials, p. 661.

† In consequence of the case of *Pilkington and others*, an Act of *Common Council* was passed on the 21st of June, in the seventh year of King William, during the mayoralty of Sir Thomas Lane, for settling the methods of *calling*, *adjourning*, and *dissolving* the Common-hall, upon the several elections of the city officers therein mentioned, which act, taking notice in the preamble of the disputes concerning such rights and powers to call and adjourn, &c. declares, "That for the preventing the like mischief for the future, the right of assembling *Common-halls* for the election of *Lord Mayors*, *Sheriffs*, and other public *officers* for the City, (except *Members of Parliament*,) and the power to dissolve the same *after such elections are made and finished, and not otherwise*, is and ought to be in the *Lord Mayor* of the City for the time being." [Vid. Mildmay on City Elections, pp. 15, 16.]

‡ Life of Lord Somers, p. 15.

§ Orrery's Life of Swift, p. 63.

On the recommendation of Mr. Somers, this edition was given to the world. Tonson published it by subscription. It was Mr Somers, and not Atterbury, as Richardson and Wharton incorrectly suppose, who had the principal share in promoting this edition. Tonson, the bookseller, in his dedication of the second edition of this work to Lord Somers, expressly says, "that nobleman's opinion and encouragement occasioned the first appearance of Milton, in the folio edition." "If," says Hayley, in allusion to the efforts of Mr. Somers on this occasion, "the spirit of a departed bard can be gratified by any circumstances of posthumous renown, it might gratify Milton, to perceive, that this divine poem was first indebted, for general celebrity, to the admiration of Somers and Addison, two of the most accomplished, and most amiable of English names*."

Milton was nine years in composing this work, and sold it to a bookseller for the miserable sum of five pounds! Early in life he seems to have anticipated present neglect, and future admiration. He seems to have felt, all through life, an aversion to servility, an impatient disdain of fools of all ranks, and a determined inflexible love of liberty and right; qualities not very favourable to a man's rise in the world. At Florence, early in life, he expressed a hope, "that, by labour and intense study, which (says he) I take to be my portion in this life, joined with a strong propensity of nature, he might have something so written to aftertimes, as they should not willingly let it die." The hope was prophetic. He sought for glory, and as it seems, for glory only, and amply has he obtained it! Milton

* Hayley's Life of Milton.

was not the only instance of a neglected genius. Shakspeare, Racine, Fontaine, and others, obtained from posterity that fame, (the darling aim of their endeavours,) which was denied to them by their undiscerning, or rather, envious contemporaries.

"*Miraturque nihil, nisi quod Libitinia sacravit.*"

It would seem true, that fame grows only in the mouldering remains of a departed genius. "Whether it is that fame, being a fruit grafted on the body, can hardly grow, and much less ripen, till the stock is in the earth; or whether she be a bird of prey, and is hired among the rest to pursue after the scent of a carcase; or whether she conceives her trumpet sounds best and farthest when she stands on a tomb, by the advantage of a rising ground, and the echo of a hollow vault*."

Dr. Johnson does not, in his Life of Milton, notice the activity of Mr. Somers, in bringing the Paradise Lost into general admiration. He probably remembered that Somers was a Whig, and what Whig was ever praiseworthy in his jaundiced eye†? Hume, who was a more moderate and rational, because a less prejudiced Tory, has in his history, done justice, in this respect, to the memory of Mr. Somers, and says that he "first brought it into request‡."

* Tale of a Tub.

† Dr. Johnson, in his Life of Milton, has shewn great malevolence towards him, and much paltry Toryism. No wonder the same prejudiced man should call King William "a scoundrel." [Boswell's Tour to the Hebrides, p. 334.] Hayley, in his Life of Milton, has vindicated our noble poet, with a becoming enthusiasm, and so has Dr. Symonds, in his eloquent life of that extraordinary man.

‡ Hume's History, 7th vol. p. 344.

How glorious does Mr. Somers thus appear, as the patron of literature, and of literary men, while yet at so early an age, and in so humble a station! Whitehead, says feelingly and truly,—

> "Patrons and arts must live till arts decay,
> Sacred to verse in every poet's lay;
> Thus grateful France does *Richlieu's* worth proclaim,
> Thus grateful Britons doat on *Somers'* name!"

The same noble feeling attended him in his exaltation. During his ascendant, and under his encouraging sanction, Addison, Prior, Locke, Steele, Congreve, and Sir Isaac Newton, were encouraged and patronised; and thus was illustrated the truth of an observation of Ben Jonson, upon Lord Bacon, "I have ever observed it to have been the office of a wise patriot amongst the greatest affairs of state, to take care of the commonwealth of learning." Pope, too, owns that Somers, amongst others, encouraged him to court the Muses, by a generous approval of his efforts;

> "The courtly Talbot, *Somers*, Sheffield read,
> Ev'n mit'red Rochester would nod his head*."

An ardent admirer of Milton, such as Mr. Somers was, must possess a mind of no ordinary cast. Some of the softer parts of his poem, may please even a trifling understanding; but, to soar with him in his vast and sublime excursions of mind; to mark and keenly relish his bold, eccentric, ardent course, can only be the luxury of a chosen few. He who enthusiastically delights in Milton, or in Shakspeare, must

* See Pope's Works—Epistle to Dr. Arbuthnot.

have his mind impregnated with some of their genius, and strung with some of their sensibilities. It is not therefore surprising, that Somers, the ardent admirer of Milton, should himself have been a poet, and in the first class of orators. It was in the same turn of thinking, that Quintillian observed, " whoever delighted in Cicero, must himself have made some proficiency in the art of elegant composition."

It was about the same period Mr. Somers translated from the Greek, one of the Lives, written by *Plutarch*. The old translation of the Lives of Plutarch by Sir Thomas North, having become obsolete, a new translation was undertaken, by what was called, " *a mob of gentlemen*, many of them bred at Cambridge." Amongst this translating " mob of gentlemen," says the accurate Malone*, " the most eminent were Creech, Duke, Knightly, Chetwood, John Caryll, Rymer, Dr. Brown the traveller, Dr. Wm. Oldys, *and Mr. Somers, afterwards Lord Chancellor*." He, however, was bred at Oxford.

The Life which Mr. Somers translated, was that of *Alcibiades*, a great and extraordinary character; whom, a contemporary of Somers, the accomplished Bolingbroke, is said to have piqued himself upon resembling, and certainly, what Valerius Maximus says of the one, may be applied to the other; " *Alcibiades ille, cujus nescio utrum bona, an vitia patriæ perniciosiora fuerint (illis enim cive, suos decepit, his afflixit :")* . . . . . *Sed viderint Athenæ utrum Alcibiadem lamententur, an glorientur: quoniam adhuc inter execrationem hominis et admirationem, dubio mentis judicio fluctuatur*†."

* Life of Dryden.

† Val. Max. Lib. 3, cap. 1. De Indole.

The translation clearly evinces, that Mr. Somers was conversant with the Greek language. Of his proficiency in Latin, his Translations from Ovid, as well as the epitaph upon his sister, and that upon his father and mother, afford very sufficient and elegant proofs. That he was conversant also with the French language, is very evident, if it be true, as it is generally believed, that he translated the very learned and excellent preface of Monsieur Tourreil, prefixed to his Translation of Demosthenes*. He was also, as I have been informed, very conversant with the Italian language.

It was about this time (1683), that the poem, intitled, *Dryden's Satire to his Muse*, attributed to Mr. Somers, was first published. It was occasioned by Dryden's celebrated poem of *Absalom and Achitophel;* a memorable satire, the *chef d'œuvre* of Dryden; written, as I have before observed, in contempt of the principles of Mr. Somers, and his party. Upon this piece, Malone has made the following remarks. "The author has never yet, with certainty, been discovered, *although it is usually ascribed to Lord Somers.* Pope assures us†, that Lord Somers was wholly ignorant of it, but if Somers had written any part of that libel (we cannot suppose him to have written the scandalous parts of it;) thirty years before he was acquainted with Pope, whose acquaintance commenced about

* This Translation was prefixed, to a Translation of Demosthenes, by several hands, published in 1704.

† I am not aware in what part of Pope's works this observation is to be found. Mr. Scott, in his Life of Dryden, p. 257, octavo edit. says, that Lord Somers "*positively disavowed*" the Satire; but he does not quote his authority, and probably, he only echoed the observation of Malone.

1711 or 12, is it probable that he would have made a young author of four and twenty, the depository of his secret. *Two years* before this Satire was published, he had appeared as a poet*; and near 200 lines of it, that is nearly two parts out of three, are a political encomium and vindication of the Whigs, without any offensive personality, couched in such moderate poetry, as is found in Somers's acknowledged poetical productions†."

Whether the poetry of Somers be moderate or not, the reader is enabled to judge. A brother poet, Addison, describes them, as "*immortal strains*‡," but in this, he may justly be suspected of flattery.

We are apt to compare works with the finest of their kind, and it is natural we should; but if the reader of another's verses, were to attend to the recommendation of *Martial*§, and try himself his own powers on the same subject, he would then learn more candidly to appreciate the merits of a writer. Pope, perhaps, had an eye to the lines in Martial, when he observed in his Essay on Criticism,

> "Let such teach others, who themselves excel,
> And censure freely, who have written well."

But this was carrying the matter much too far, and silencing the critics with a vengeance. If such was really Pope's opinion, why did he, in the notes to his Translation of Homer, lay so much stress on the Criticisms of Eustathius? for Eustathius had no pretensions whatever to the character of a poet; why did he also, on all occasions, bow to the authority of

* He alludes to his translations from Ovid.

† Malone's Life of Dryden, p. 166.

‡ See his Dedication of "*the Campaign*" to the Lord Keeper Somers.

§ Mart. Epigr. lib. 2, Epigr. 71.

Aristotle? for Aristotle, though he has given excellent rules to poets, was no poet himself.

Dr. Johnson says the poem was ascribed to Somers, and that this Satire, whosesoever it was, has much violence, and some sprightliness; the writer tells all the ill he can collect of Dryden, and his friends*."

As a specimen of Mr. Somers's powers of satire, I shall quote a part of this poem.

Dryden, is thus supposed to address his Muse,

> " Hear me, dull prostitute, worse than my wife;
> Like her, the shame and clog of my dull life;
> Whose first essay was in a tyrants' praise†,
> Bawdy in prologues, blasphemous in plays:
> So lewd, thou mad'st me for the church unfit,
> And I had starv'd, but for a lucky hit,
> When the weak ministers implor'd my wit:
> Stol'st me from business, where I might have made
> A solid fortune, to thy barren trade.
> My father wisely bid me be a clerk;
> Thou whisper'dst—boy, be thou a tearing spark.
> I from that fatal hour new hopes pursu'd,
> Set up for wit, and awkwardly was lewd;
> Drank 'gainst my stomach, 'gainst my conscience swore,
> Against my will I married a rank whore.
> After two children, and a third miscarriage,
> By brawny brothers hector'd into marriage.
> Affected rapes and lusts I'd never known;
> As if that all Gomorrah was my own.
> Nor love, nor wine, could ever see me gay,
> To writing bred, I knew not what to say.

* Lives of the Poets, vol. 2, p. 39.

† His Panegyric on Oliver Cromwell.

With scolding wife, and starving chits beset,
When I want money, and no friend will treat,
Cheer'd with one cup of thy Castalian spring,
I can abuse the church, my friend, and king."
* * * * * * * * *
" Thou'lt say, perhaps, what is all this to thee,
If I a coward, cuckold, villain be?
But then thou should'st thy sacred aid refuse,
When I invoke it to so base a use;
Blunt of my murd'ring pen the killing point,
And honestly refuse the odious hint.
But thou ne'er com'st so gladly to my call,
As when on merit unprovok'd I fall.
Is there a patriot to be defam'd,
Lady abus'd, or virtuous action blam'd?
Thou, with officious haste, rank'st every word,
And giv'st thy raging madman a sharp sword:
Devils to witches are not more at hand
Than thou, when I an hellish task command."
* * * * * * * * *

He then alludes to the efforts in Parliament relating to the Exclusion Bill.

" By Laws, they would a Popish heir exclude,
Not by rude force, or a tumultuous crowd:
Against Navarre the factious princes leagu'd,
And the right heir the Papal world intrigu'd:
When a long war had plac'd him on the throne,
The state-religion he was forc'd to own;
The harmless people took it in good part,
The zealous church yet stabb'd him to the heart;
Taught all by story, there was no defence
But they must change their faith, or change their prince.
Who would not here the like extremes prevent,
And settle things by aid of parliament?
Thou only court, presiding at the helm,
Which mak'st all others useful to the realm.

Inferior judges tremble to decree
What may hereafter be condemn'd by thee:
The chancellor's and statesman's only dread,
For it is thou alone can reach their head.
By the fell Wolsey, and false Clarendon,
Abandon'd by their kings, but here undone;
Both overwhelm'd for daring to remove,
Or stem the torrent of their master's love:
The one, fair Bullen to his prince deny'd;
The other made lov'd Stuart, Richmond's pride,
And with the royal blood, for ever mingl'd Hyde.
To their own ruin, can all men agree,
And none the precipice but courtiers see?
Courtiers, who importune the sovereign,
To pardon robbers, cut throats! for their gain;
Who live on ideots, lunatics, forfeits, fines,
And cannot thrive but when the nation pines.
Unhappy we, if rul'd by such, whose rent
Consists in breaches of the government.
Some few there are with great estates indeed,
Yet labour with imaginary need:
Strange sort of fools, who, for one pension more,
Enslave themselves, and all they had before.
Others, with titles and new earldoms caught,
Would give up all for which the barons fought:
They're equally unfit for government,
Who nothing have, or nothing will content."

* * * * * * * * *

He then alludes to Dryden's politics, and again to the Bill of Exclusion.

"The people's voice, of old the voice of God,
Thou call'st the voice of an unruly crowd.
Crowds are the fools, * * * * * * * *
That flock to thine and D'Urfey's loyal plays,
And give implicit claps on your third days:

About the stage of mountebank they wait,
And whoop at cudgels, or a broken pate,
But have, like thee, no int'rest in the state.
Rule as thou wilt, the realm of Mexico,
And under iron yokes make Indians bow;
But with old England, what hast thou to do?
Who from our kings no useful pow'r would take;
Nor have the pow'r; but for the people's sake
Disarm themselves, and anarchy bespeak.
Kings may do good at their full stretch of will,
And need not for a strain of law stand still.
They spare with mercy, though with judgment kill,
Confin'd like God, only from doing ill."

* * * * * * * * *

"Though we all perish, yet we must forbear
The sacred title of a Popish heir,
If we thy foolish politics should hear.
Somewhere there must a sov'reign pow'r be,
In Kings, in Lords, in Commons, or all three,
Deriv'd from God, and only less than his,
Which can do all, and nothing do amiss;
The sacred ties of marriage can dissolve,
And children in their parents crimes involve,
Making those bastards who had else been heirs,
And injur'd husbands legal widowers;
Cut off entails, make new, repeal old laws,
And of contending kings decide the cause.
This from the helm our learned Richard thrust,
Confess'd their pow'r, and own'd their sentence just.
And on the throne our brave fourth Edward sate,
Whilst Harry liv'd a pris'ner of the state.
Alphonso thus depos'd for his weak life,
Pedro enjoy'd his kingdom and his wife.
There, *jus divinum* barks not at his right,
Damns not his rule by day, nor love by night.
In his defence, each private man may kill
Must then a nation perish and stand still?

If for our laws, faith, God, we must not fight,
When can a christian sword be in the right?"

In the following lines he alludes to the Lord Godolphin.

"Thy Hushai next, a true friend e'er a man,
So soon his dearness, with his prince began,
Was but fourteen when David was abroad,
Less fit for a king's friendship than a rod;
Which he deserv'd, when he with tears reply'd,
And in full house, the loyal baby cry'd."

* * * * * * * * *

He finely characterises the Duke of Ormond.

"Barzillai's praise I could rehearse again,
And make the labour of my second pen;
Wise, valiant, loyal, rich, of high descent,
Born t'all that fortune for her darlings meant,
Who nobly scorn'd a private happiness,
When he beheld the sovereign in distress:
To arms he flew, but with bold Cato's fate,
Espous'd the cause that fortune seem'd to hate:
Striving to save the head that wore the crown,
He pull'd the mighty ruin on his own."

In the following lines the Bishop of London is alluded to.

"But why extoll'st Jerusalem's sagan,
At drink and whores indeed a very dragon?
Not Magdalen, possess'd in all her prime,
With her ten devils, could have equall'd him."

The Marquis of Halifax is then described.

"Or Jothan flatter'd, that vain fickle thing,
Famous for jests upon the church and king:
One while Pythagoras's harmless food,
For thoughts and politics must cool his blood;

And then again, with whores and lusty wines,
Revels all night, and thinks him mad that dines;
Quibbles, jokes, puns, and trifling wit he has,
And like the Swede, is very rich in brass."

He adverts to the dissolution of the Westminster Parliament, and the subsequent declaration, which has already been alluded to.

"Our parliament's dissolved, new members meet,
An Oxford journey must allay their heat,
But the true English interest appear'd
The silversmiths for their Diana fear'd;
Pop'ry would pass on us in no disguise,
No flow'rs would hide that serpent from our eyes,
We're in such haste dissolv'd, that in the street,
New chosen, with dissolv'd members meet;
And then a paper in good David's name,
Must the proceedings of the house defame.
Sheriffs and juries pack'd, justices made
Knights of th' address, and all false colours laid,
To cheat their party with a vain conceit,
The people, parliaments both fear and hate.
What Sampson in a dungeon, captive, blind,
In spiteful rage for cruel foes design'd,
The House of Commons must be thought to do
Against themselves, and those that trust 'em too.
The head shall sooner fear its own right hand,
Parents their smiling infants death command,
The cheerful birds sit silent in the spring,
Than Lords or Commons hurt the realm or King.
They may thy heroes, that small faithful band
Precious counsellors, who dare singly stand
'Gainst the collective wisdom of the land.
David in exile had more friends than thou
Wilt to his best, his happier days allow.
Why sounds thy trumpet in the time of peace?
Art thou afraid our diff'rence should cease,

That thus thou talk'st of rebels, treasons, more
Than any Irish witness ever swore:
Soldiers of fortune thus to drive a trade,
Care not what ruin, or what slaughter's made."

"But hear me prophecy, and mark me well,
E're thrice the rose renews its fragrant smell,
People and king shall join, like man and wife,
And both abhor the engines of their strife:
No more shall they endure a hackney pen,
And thou, cashier'd, shalt to the stage again,
Please none but silly women, or worse men;
David shall find duty an empty word,
(For diff'rent faiths can never have one sword:
The knot of friendship is but loosely ty'd,
'Twixt those that heavenly concerns divide.)
He then shall with his parliament agree,
And lives and fortunes shall their language be;
Monmouth be bless'd for all that he has done,
While thy vile heroes to their pardons run."

From the last couplet one might be induced to think that Monmouth had been designed, by the Exclusionists, to succeed Charles the Second. There was a project to legitimate him.

Some of the lines of this Satire have uncommon vigour and poignancy; but though we should not think very highly of these verses, or commend the severity with which Dryden is treated, they must at least impress a strong idea of the diversified powers of the author's mind. Whilst on the subject of Mr. Somers's poetry, it may here be observed, that he is said to have written a piece of poetry, which another had the effrontery to own, and that this person was introduced to his Lordship when he was Chancellor; upon which, Lord Somers took occasion to ask him, whether he wrote such a paper

of verses? "*Yes, my Lord,*" he replied, "*'tis a trifle, I did it off hand.*" At this, his Lordship laughed heartily, and the pretended poet withdrew in the utmost confusion*.

Of what description the verses were, which are alluded to in this anecdote, or when they were written, does not appear. Probably, they were the amusement of his younger days, as I do not find any poetical pieces ascribed to him, as the produce of his advanced age. *Selden* observes, "'Tis ridiculous for a Lord to print verses, 'tis well enough to make them to please himself, but to make them public, is foolish†." It is not easy to comprehend the justness of the remark. Was it meant in depreciation of lords, or of poets? In either sense, it is a sentiment altogether unworthy of the admirable Selden, or at least, tolerable only, as "*Table Talk.*"

* Life of Lord Somers, p. 124.
† Table Talk, title Poetry.

END OF THE SECOND BOOK.

CONTENTS OF BOOK III.

Mr. Somers employed as one of the Counsel for the Seven Bishops —The Circumstances which led to that Trial—Proceedings on the Trial of the Seven Bishops—Remarks on the Trial—Reflections on the Conduct of Mr. Somers on this Trial—General abhorrence of Popery—South's prophetic Sermon.

BOOK III.

IT was true, as Ralph asserts*, that Mr. Somers was long a practitioner at the bar before his merits were suitably distinguished. The first great cause in which Mr. Somers was distinguished as an advocate, was in the celebrated trial of the *seven Bishops*†. I shall therefore state, with some particularity, this interesting trial. It forms a memorable epoch, not merely in the life of Lord Somers, but also in the History of England‡. It was a trial which, on account of the exalted and venerable persons concerned, and the high constitutional points discussed, was well suited to call forth the genius of Mr. Somers. To use the words of Mr. Justice Powel, one of the judges upon that great occasion, and who proved himself a staunch friend to the liberties of his country, "The matter

* 2 Vol. 784. † Life of Lord Somers, p. 15.

‡ If any person wishes to be convinced of the manner in which the Jesuit, Father Orleans, misstates and misrepresents facts, in his pretended History of the Revolutions in England, under the Stuarts, let him read his account of the conduct and trial of the seven Bishops.

transacted now before us appears to me to be of very great weight, peradventure a greater or weightier has not been agitated in this place in any age*." One of the points disputed was, whether James could *suspend* and *dispense* with Acts of Parliament? It was therefore, in some sort, a re-trial of the legality of the dispensing power, which had been, in so solemn and extraordinary a manner, sanctioned by a great majority of the judges in Sir Edward Hales's case. Many legal points arose in the course of the trial, for all the acumen of the gentlemen of the long robe was called into play, and most zealously and ably did they act their parts.

In the April of the year 1688, James published, for the *second* time, a Declaration in favour of liberty of conscience, almost in the same terms with the one which he had promulged the year before; and an order passed in Council, requiring the Bishops to send copies of the Declaration to all their clergy, and order them to read it on two several Sundays, at the time of divine service. Amongst other matter, the Declaration contained the following remarkable passage: "*We do likewise declare it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws, in matters ecclesiastical, for not coming to church, and not receiving the sacrament, or for any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatever, be immediately suspended, and the further execution of the said penal laws, and every of them, is hereby suspended.*" And in another part of the Declaration it was said, "*That the oaths, commonly called the Oaths of Supremacy and Allegiance, and also the several tests and declarations*

* See Trial of the Seven Bishops, in State Trials.

mentioned in the acts of parliament made in the twenty-fifth and thirtieth year of the reign of our late royal brother King Charles II. shall not at any time hereafter be required to be taken, declared, and subscribed, by any person or persons whomsoever, who is or shall be employed in any office or place of trust, civil or military, under us or in our government."

A more open and unlimited avowal of a *suspending* power could not be made; and the use to which it was attempted to apply this assumed prerogative, in the overthrow of the barriers of the established religion, was calculated to excite, as it did, universal alarm; and the more so, as one of the most forcible arguments urged against the proposed Exclusion Bill, in 1680, was, *that the test laws could not be abrogated but by parliament**.

The principles of toleration which the Declaration breathed, in matters of religion, cannot be the subject of disapprobation; they were generous and enlightened. Who does not, or rather ought not, to exclaim with the author of the Henriade,

> "*Et périsse á jamais l'affreuse politique*
> *Qui pretends sur les cœurs un pouvoir despotique.*"

Freedom of worship is the right, the inalienable right of every man, and poor indeed is the policy of that monarch, who would affect to constrain it. "*Fides suadenda est, non imperanda.*" In the concerns of religion every man must act for himself, he cannot delegate his conscience. As Le Clerc observes, "it is as absurd to ill use and persecute subjects, under a pretence of error in religion, as it would be for a magistrate

* See the speech of Sir Leoline Jenkyns, at that period, in 1 vol. Wynne's Life and Writings of Sir Leoline Jenkyns, p. 103.

to punish a mathematician for making a mistake in calculation*." But amidst all King James's parade of liberal principles, the bigot lay hid, and a temporary toleration was evidently designed to pave the way to intolerance. "*Speciosa verbis, re inania, aut subdola: quantóque majore libertatis imagine tegebantur, tanto eruptura ad infensius servitium*†." The pretext of an universal liberty of conscience was considered by James as the surest method of engaging the dissenters on his side, and of covertly introducing popery; and by this sorry device, he did, for a time, lure many of the dissenters on his side, whose principles as naturally lead them towards liberty, as popery tends towards despotism. The Marquis of Halifax, who had been dismissed from the Council, for incompliance with the Court schemes, applied his fine genius to unfold the secret purposes of James, in a work intitled, "*A Letter to a Dissenter, upon the Occasion of his Majesty's late gracious Declaration of Indulgence.*" The Indulgence, he justly divined, was only preparatory to the introduction of Popery. The inconsistency of indulgence by a popish king, as well as the illegality of the indulgence, and the danger to the constitution by countenancing it, were all admirably exposed by that beautiful writer.

It was matter of much delight, as well as surprise, that the very order of men, the clergy, who had but too often, in former times, been found the ready instruments of oppression, now arose as the glorious defenders of their country's liberty and its holy altars. All, even the enemies of the hierarchy, must remember with gratitude, the patriot firmness of the seven Bishops at this trying moment. In allusion to

* See Parrhasiana. † Tacit. Ann. Lib. 1, s. 81. Edit. Brotier.

Scripture, they were emphatically called, the "*seven candlesticks.*" Lanfranc, the Archbishop of Canterbury, by a noble stand in favour of his country, saved its rights and liberties from the grasp of William the Norman; and the seven Bishops, in like manner, saved them from the tyrannous attempts of James; and, to use the expression of a celebrated prelate, "attoned, in some measure, for former miscarriages*." Their conduct was indeed every way noble. They felt for their clergy in a truly christian manner; and, unwilling to subject them to the difficulty of complying with the orders of the King, contrary to their consciences, or of refusing, and thereby ruining their families†, they themselves resolved, respectfully, and by all legal means, to resist the King's orders to spread the Declaration, and to petition his Majesty; which they did, in the following petition.

"The humble Petition of William, Archbishop of Canterbury, and of divers of the suffragan Bishops of that province, (now present with him,) in behalf of themselves and others of their absent brethren, and of the Clergy of their respective diocesses,

"Humbly sheweth,

"That the great averseness they find in themselves, to the distributing and publishing in all their churches your Majesty's late Declaration for liberty of conscience, proceedeth neither from any want of duty or obedience to your Majesty; our holy Mother, the Church of England, being both in her principles and in her constant practice, unquestionably loyal,

* Hurd's Dialogues.

† See *Caveat against the Whigs*, second part, p. 37.

and having, (to her great honour,) been more than once publicly acknowledged to be so by your gracious Majesty; nor yet from any want of due tenderness to dissenters, in relation to whom, they are willing to come to such a temper as shall be thought fit when that matter shall be considered, and settled in parliament and convocation. But among many other considerations, from this especially, because that Declaration is founded upon such a *dispensing power* as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign; and is a matter of so great moment and consequence to the whole nation, both in church and state, that your petitioners cannot, in prudence, honour, or conscience, so far make themselves parties to it, as the distribution all over the nation, and the solemn publication of it once and again, even in God's house, and in the time of his divine service, must amount to in common and in reasonable construction."

The King, upon reading the petition, was surprized and inflamed. By the advice of Jefferies the Chancellor*, the Bishops were summoned before a council, at which the enthusiastic monarch was present. When they appeared, they were asked, Whether they owned the petition? They answered, "they humbly hoped, that if they stood there as criminals, his Majesty would not take advantage against them, for they were always ready to obey his just commands." To ask questions of the Bishops, for the purpose of employing their answers as evidence against them, was not decorous, and the Bishops were aware that they could not, according to the

* 1 Macpherson's State Papers, p. 153.

humane principles of the English law, be compelled to confess any thing which might criminate them. It has been said*, that the royal word was, with a sinister view pledged, that if they owned the petition, not a hair of their heads should be touched; but this does by no means appear by the evidence given on the trial, but is, on the contrary, expressly refuted. James had errors enough to answer for, let us not untruly swell the woeful catalogue. The Bishops were ordered to withdraw, and being afterwards called in, a second time; to the same question, they made the same answer; but the Chancellor, the corrupt Jefferies, at their *third* coming in, pressing them to own or disown the paper, the Archbishop confessed that it was written with his own hand, and the rest acknowledged they had signed and delivered it, adding, with undaunted resolution, "That they had done nothing but what they were ready to justify." It was then asked of the Bishops, whether they would give their recognizances to appear before the Court of King's Bench, to answer this high misdemeanor, as it was termed; but this they all refused, insisting, "on the privilege of their peerage, which they said they were resolved to maintain, as well as the rights of the church, *being equally bound by their callings to resist all innovations both in government and religion.*" There are few instances of so noble and so steady a resolution, under circumstances so peculiar. Their answer quite astonished the council, and the Chancellor, with fatal violence, threatened to send them to the Tower, unless they immediately recanted and withdrew their petition; but they were not to be daunted by the frown of power. They

* Rapin, 12 vol. p. 90, octavo edition.

unanimously answered, "That they were ready to go whithersoever his Majesty would please to send them. They hoped the King of Kings would be their protector and their judge. They feared nothing from men; for having acted according to law and their own consciences, no punishment should ever be able to shake their resolutions!" Such language may remind the reader of a sublime passage in Racine's celebrated Tragedy of Athalie:—

> *Celui qui met un frein, à la fureur des flots,*
> *Sait aussi des mechans arrêter les complots,*
> *Soumis avec respect a sa volonté sainte,*
> *Je crains Dieu, cher Abner, & n'ai point d'autre crainte.*

The result of the magnanimous conduct of the Bishops was, a warrant, drawn and subscribed by Jefferies the Chancellor, the Earl of Sunderland, Lord Arundel, the Marquis of Powis, and others of the council, except Father Petre, who, for obvious reasons, was excused, committing them to the Tower; the cause expressed in the warrant being, "*for contriving, making, and publishing,* A SEDITIOUS LIBEL *against his Majesty and his Government,*" and the Attorney and Solicitor General were ordered to prosecute them the next term. At first, it was intended to try the Bishops before the Ecclesiastical Commissioners, but Jefferies persuaded the King to prefer an information*.

The Bishops went, like their great Exemplar, to prison, firm and undaunted; not, however, like him, amidst the vulgar scoffs and howlings of the enraged and misguided multitude,

* 2 Vol. Secret History of Europe, p. 115.

but consoled by the admiration, the love, and pity, of all who saw them. They carried with them the gratulations of an approving conscience;—

> "What nothing earthly gives or can destroy,
> The soul's calm sunshine, and the heartfelt joy."

On the 15th of June, after an imprisonment of nearly three weeks, the Bishops were brought to their trial. The bench was filled by Sir Robert Wright, Lord Chief Justice, and Mr. Justice Holloway, together with Mr. Justice Powell, a protestant of great integrity, and Mr. Justice Allybone, a professed papist. It was obvious, therefore, that the only hope of the Bishops consisted in the justice of their cause, and the integrity of their jury. The counsel for the King, were the Attorney General, Sir Thomas Powis; Sir William Williams, the Solicitor General*; Sir Bartholomew Shower, the Recorder of London; and Serjeant Trinder, a papist, &c. For the Bishops, the most eminent counsel in the country, and Mr. Somers amongst the rest, were retained. It has been said they *volunteered* their services, but this appears to have been a mistake, for in Gutch's *Collectanea Curiosa*†, every particular of the expenses of the Bishops incurred on this trial, is minutely recorded, and the fees of the different advocates, upon this great occasion, are noticed. The Bishops contributed in proportion to their incomes.

* Sir William Williams, the oracle of the Whigs, and speaker of the two last parliaments of King Charles II. who was so full of fears of popery and arbitrary power, when there was but little occasion, was now Solicitor General, and carried the prosecution as high as possible, openly boasting, "*that he had tacked about, and taught others to do so too.*" [Appeal to the Whigs, second part, 49.]

† 2 Vol. 368.

The counsel employed for the Bishops were, Sir Robert Sawyer, Mr. Finch*, Mr. Pollexfen, Sir George Treby, Serjeant Pemberton, Serjeant Levinz, and Mr. Somers, "the last and greatest," (as one of the historians terms him,) were those who were retained as counsel for the Bishops. "All of them," said Lord Camden, "lovers of liberty, and the greatest lawyers of that age†." The Bishops, amongst themselves, objected to Mr. Somers, as too young and obscure a man; but Mr. (afterwards Lord Chief Justice) Pollexfen, insisted on his great abilities, and declined taking any share in the defence, unless Mr. Somers was associated with him. He represented to the Bishops, that Mr. Somers would take most pains, and go the deepest in all that depended on precedents and records‡. It is plain, therefore, that Mr. Somers was not retained by the Bishops, and therefore not bound in honour to defend them, whether desirous of doing so or not, but that he himself solicited, and, as it were, thrust himself into the post of danger, and in that respect deserves a praise which did not be-

* In his enumeration of the Bishops counsel, Mr. Hume has omitted to mention Finch and Levinz.

† But of all those lawyers, Mr. Somers was the only one who was altogether unexceptionable. Pollexfen, for instance, had acted as King's Counsel in Jefferies's *Western Campaign*, [Ralph's History, 1 vol. 989.] Sawyer and Finch, the late Attorney and Solicitor General, had been more zealous than honest men and good patriots would have been, for the violent proceedings against Russell and Sidney, and were implicated in the surrender of charters. [See what Mr. Hargrave says in his interesting and learned preface to Sir Matthew Hale's work "On Judicature in Parliament," p. 14.] I quote that preface with additional pleasure, since it affords me an opportunity of expressing my admiration of Mr. Hargrave. When I reflect upon his profound, his useful, his infinite labours, his gentle manners, his pure, disinterested, and patriotic mind, he seems to me to rank amongst the greatest benefactors of his country!

‡ Birch's MSS. Brit. Mus.

long to his co-adjutors. "Though," says Hurd, "in the great bodies of churchmen and lawyers, some will always be found to dishonour themselves, there have never been wanting others to do justice to the public, and to assert, maintain, and preserve the dignity of their respective professions*."

Mr. Pollexfen's concern for Mr. Somers's rising merit is creditable to his memory. The younger Pliny, in several of his letters, evinces the same generous concern for talent, and frequently consents to become the advocate of his correspondent, provided some of his meritorious friends, whom he named, were associated with him†.

The court was crowded with nobility, and thousands of persons anxious for the issue of so important a controversy; and amongst the rest, the Earl of Shrewsbury was present, and, doubtless, he was anxious to observe how Mr. Somers would acquit himself on this great occasion. The first step taken was by the Attorney General, who moved for an habeas corpus, directed to the Lieutenant of the Tower, to bring up his Grace the Archbishop of Canterbury, and the six Bishops, which was granted, and the venerable prisoners shortly afterwards were brought into court. A knowledge of the points in this great cause are indispensable to the constitutional lawyer, and are well worthy the notice of the statesman. Some of them I shall mention.

The return and warrant being stated, the Attorney General moved that the information might be read to the Bishops, and that they might plead to it. This was opposed by the Bishops counsel, who contended that the prisoners were not legally in

* Hurd's Dial. 2 vol. p. 324, in note.

† See C. Plin. Epis. Lib. 6, Epis. 23.

court, because, from the warrant of commitment, and the return to the *habeas corpus*, it appeared—First, the prisoners were committed *by the Lord Chancellor and others of the Privy Council*, without expressing in the warrant, "*that it was by order of the Privy Council;*" for if the commitment was not by the Lords *in council*, they had no power to issue such a warrant of commitment. And secondly, the fact for which they were committed, was such as they ought not to have been *committed* for, because a Peer ought not in the first instance, to be committed for a *misdemeanour*. But it was determined as to the first point by the Judges, (with the exception of Mr. Justice Powell, who wished for time to look into the books,) that the warrant of commitment by the Privy Council was according to the usual form, and was unobjectionable. And as to the second point, (with the exception of Mr. Justice Powell, who wished for time to consider,) they held that *a seditious libel*, (the fact charged in the warrant of commitment) was a *breach of the peace*, and was such a misdemeanour as required sureties of the peace, and if sureties were not given, (as they were not,) a commitment might legally ensue*.

* Lord Chief Justice Pratt observed, on a motion made before him for a *habeas corpus*, on behalf of John Wilkes, a member of parliament, who was committed to the Tower for publishing a libel, "It is to be remarked, that when the seven Bishops were sent to the Tower, the plea that was used when the Spiritual Lords contended for their privilege was, that they had endeavoured to disturb the peace; this, at that arbitrary time, was judged sufficient to forfeit their privilege; but, out of the four Judges, there was but one honest man, that was Powell, and he declined giving any opinion." [Memoirs of Wilkes, by Almon, vol. 1, p. 121.]

The question before the court, in the case of the seven Bishops, related to the privilege of *Peers* in parliament, which differs certainly in many respects from the privileges claimed by *Members of the House of Commons;* but still it appears, that if the Judges did right in disallowing the privilege claimed by the seven

The information, which was in Latin, was then read. The Bishops requested it might be read in English, for they said, they did not understand law Latin, (a severe sarcasm on the miserable jargon then in use,) but their request was not acceded to. The offence charged by the information was, *the framing and publishing a seditious, false, and malicious libel against the King's prerogative and government, under the pretence of presenting a petition to the King.*" The Bishops counsel desired they might have what is called an *imparlance*, or postponement of trial, to the next Term, to consider what they should plead; but all the Judges, (except Mr. Justice Powell,) determined, on a reference to the officers of the court as to the

Bishops, the Judges of the Common Pleas did wrong in allowing privilege to Mr. Wilkes, in a case upon a warrant of commitment so very similar to that in the case of the seven Bishops. The Court of Common Pleas felt the difficulty, and therefore expressly held that they considered the determination, in the case of the seven Bishops, not to be *law*, for if it was law, it was an authority in point. It is certainly true, that many of the doctrines of the Judges in that case, were unquestionably wrong, yet it does not follow that *all* their doctrines on that occasion were illegal. After the Revolution, the Bishops trial received a very close and spirited revision in parliament: the warrant for the Bishops commitment was laid before the House of Commons, and after being fully considered, the result was, that the commitment, or that part of the Judges determination, which refused the Bishops the privileges they claimed as Peers of Parliament, was not censured, and therefore it may fairly be contended, that the silence held upon that subject, was a tacit avowal that the conduct of the Judges, *in that respect*, was *legal*.

[See as to what passed in both Houses of Parliament, the entries of the Journals. The Lords Journal of the first and tenth of May, 1689, and the Commons Journal for 4th June, 1689. See also, on this subject, "Some observations on the late Determination for discharging Mr. Wilkes from his Commitment, &c." Both the House of Lords, and the House of Commons, resolved, contrary to the opinion of Lord Chief Justice Pratt, "that the privilege of Parliament does not extend to the case of writing and publishing seditious libels, &c." Vid. Commons Journal for 24th November 1763, and Lords Journal of the 25th November, 1763. See Clarendon on this subject, 1 vol. History of Rebellion, p. 484, octavo edit.]

practice, that a person who comes into court upon a commitment, is not entitled to an imparlance, but must plead immediately. The Bishops then pleaded, that they were Peers of the kingdom of England, and Lords of Parliament, and ought not to be compelled to answer instantly for the misdemeanour mentioned in the information, but that they ought to be required to appear by due process of law, issuing out of the court, upon the information; and, upon their appearance, to have a copy of the information, and reasonable time to imparle thereupon, and advise with their counsel. But the court, with the exception of Mr. Justice Powell, determined the plea to be *frivolous*, and in effect, what had before been argued and determined, and therefore considered themselves as having power to reject it, and oblige the prisoners to put in another plea. Upon this, the Bishops pleaded generally, *Not Guilty*, and issue was joined by the Crown; notice being given, at the same time, that it was intended to try the cause on that day fortnight, and, by consent, it was to be a trial at bar. The Bishops were then set at liberty, upon giving their own recognizances, the Archbishop in 200*l.* and the rest of the Bishops in 100*l.* each. Mr. Somers took no part in the discussion of these preliminary points.

On the 29th of the same month, St. Peter's day, the Bishops again appeared, in a court more thronged than ever with anxious spectators, composed, as on the former day, of vast numbers of nobility and gentry; so much so indeed, that it seemed more like the House of Peers than an ordinary court of justice: twenty-nine Peers were present. After the information was read, the Attorney General addressed the jury, and in particular observed, "My Lords (the Bishops) are not prosecuted for any point or matter of religion, but they are prosecuted as subjects of this kingdom, and only for a temporal

crime, as those that have injured and affronted the King to his very face; for it is said to be done in his own presence. In the next place, they are not prosecuted for any non-feazance, or not doing, or omitting to do any thing, but as they are actors for censuring of his Majesty and his government, and for giving their opinion in matters wholly relating to law and government." The King's two Declarations, under the great seal, of the 4th of April, 1687, and the 27th of April, 1688, were produced and proved, as was also the Order of Council of the 4th of May, 1688, for the reading of these Declarations.

The next object was to prove the Bishops hands to the *petition*. An endeavour was made, *by comparison of hands*, to prove the signature of the Bishop of St. Asaph, and also the signature of the Bishop of Ely. Great discussion ensued as to the admissibility of this dangerous evidence. The point certainly was of the utmost importance. The Court were divided in opinion as to the admission of the proof; the Chief Justice and Mr. Justice Allybone thought it evidence, but Mr. Justice Powell and Mr. Justice Holloway* were of a different opinion. The evidence therefore was rejected†.

The counsel for the Crown then adduced evidence, which

* "A person on whom no particular praise attaches; but it is highly creditable to him that he could so stand out in such times." Mr. Attorney General (now Lord Chief Justice Ellenborough,) in King *v.* Cator, 4 vol. Esp. N. P. Cas. p. 123.

† Whether *comparison of hands* is evidence, was much discussed in the King *v.* Cator, 4 Esp. N. P. Cases, p. 117, &c. and was there determined to be inadmissible. See also some excellent remarks by *Lord Eldon*, on this species of evidence, in Eagleton and another, *v.* Kingston, 8 Ves. 473, &c. In the *Star Chamber*, such evidence was allowed. [Collectanea Juridica, 2 vol. p. 100.] In such a court, no wonder such evidence should be used.

proved, that the Bishops, when called before the Council, expressly *owned* the petition.

It was then objected, that the making and writing the libel *in Middlesex*, was not proved. Upon this point, Mr. Somers, for the first time during the trial, addressed the Court. He observed, "If your Lordship please, all matters of crime are so local, that if it be not proved to be done in the county where it is laid, the party accused is as innocent as if he had never done the thing; and, with submission, it is the very point of the information, that it be proved they are guilty of the fact in the place where it is laid to be done."

Lord Chief Justice—"This is the same thing over and over again; but I am content to hear you, Mr. Somers, at any time." . . . .

It was insisted, this point was prematurely argued, and that the petition should first be read: it was accordingly read. It was then proved, on the part of the Bishops, that when the petition was written, the Archbishop was at Lambeth-house, in Surrey.

Admitting that the petition was *made* in Surrey, yet the Solicitor General insisted the *publication* was proved to be in Middlesex, and that that was sufficient to support the information; but, on the other hand, it was denied that any *publication* was proved. The Bishops owning their signatures to the petition, it was contended, did not amount to a *publication;* and that the delivery of the petition to the King was not proved; and in this the Court agreed; the Chief Justice observing, "they may think what they will of me, but I always declare my mind according to my conscience."

In this stage of the prosecution, the counsel for the Crown

were in a great dilemma; their proofs, hitherto, were imperfect, and their information in a most hopeless condition. The Chief Justice began to sum up, and would, probably, as he himself afterwards said, have directed the jury to find the Bishops not guilty; but, before he had proceeded any length in his charge, he was interrupted by Mr. Finch, one of the Bishops counsel, who got up and said, "if it be evidence, we have other matter to offer, in answer to that evidence, and in our own defence." Mr. Serjeant Pemberton, Mr. Pollexfen, and Mr. Serjeant Levinz, seeing probably the favourable course the summoning up would take, seemed anxious that the Chief Justice should proceed in his charge. Mr. Finch too, recollecting himself, said that all he had to say, "amounted to no more than this, that there being no evidence against us, we must of course be acquitted." The Solicitor General, however, took advantage of the interruption; he said, "there is a fatality in some causes, my Lord, and so there is in this; we must beg your patience for a very little while, for we have notice that a person of very great quality is coming, that will make it appear that they made their addresses to him, that they might deliver it to the King."

Lord Chief Justice—"Well, you see what comes of the interruption, gentlemen, now we must stay."

If the Bishops had afterwards been found guilty, Mr. Finch would have felt somewhat unpleasantly; but, as they were afterwards acquitted, it proved a fortunate circumstance that the trial went on; for, otherwise, the *suspending* power and other points, would not have been brought into discussion.

After waiting a considerable time, the Lord Chief Justice required that an oath should be made, that the witness was

coming, and the cryer of the court gave evidence to that effect, *his left hand giving his right hand the oath.*

The expected witness at length arrived, it was no other than Lord Sunderland, the President of the Council! He proved that the Bishops of St. Asaph and Chichester, came to let him know, in the name of the Archbishop, the four other Bishops, and themselves, that they had a petition to deliver to the King, and that he went immediately to the King, and, at his instance, six Bishops, but not the Archbishop, were admitted to the King.

The evidence went no farther, and did not ascertain whether the Bishops delivered the petition to the King or not.

The Lord Chief Justice, however, thought that this last piece of evidence, coupled with the proof of the production of the petition by the King, and the owning of it by the Bishops before the council, would be evidence to the jury of the publication.

Sir Robert Sawyer, in a very able speech, addressed the jury in defence of the Bishops. When he arrived at that part of his speech, where he applied himself to shew that the King had no power of *suspending* laws, the Lord Chief Justice said, aside, *I must not suffer the King's power of suspending laws to be disputed;* but Mr. Justice Powell boldly opposed this; for, says he, "if the King hath no such power, (as clearly he hath not in my judgment,) the natural consequence will be, that this petition is no diminution of the King's regal power; and so not seditious or libellous." Upon this, the Lord Chief Justice observed, "Brother, I know you are full of that doctrine; but however, my Lords (the Bishops) shall have no occasion to say that I deny to hear their counsel—Brother, you shall have your will for once, I will hear them, let them talk till they are weary."

Without entering at length into the speeches of Sir Robert Sawyer and the other counsel, I shall only advert to the substance of them. Their observations were principally directed, 1st, As to the *matter* of the petition—2dly, the *manner* of delivering it—and 3dly, the *persons* who presented it. The evidence, they contended, shewed the petition was not presented in an improper *manner*, but privately and in secret, and with humility and duty; and it was, they contended, the subjects undoubted right to petition. As to the *persons* presenting it, they were Bishops, and as such, bound to a general care of the church; and were bound, in an especial manner, to protect the *law of uniformity**. As to the *matter* of the petition, the Bishop's counsel adduced evidence to shew, that it was true, and according to law. For this purpose, they produced in evidence, a copy of two records, in the Tower, which were proved by the person producing them, to have been examined with the original. "*Ex rotulo Parliamenti de Anno Regni Regis Richardi Secundi, XV.*" No. 1 and No. 8. The records were written in French. A person was sworn to look at, and translate the copies of the records, but this person not reading them very readily, a copy of the records, in English, was read. From these records, it appeared, that in Richard the Second's time, a power was given by the Commons to the King, with the assent of the Lords, to dispense, for a short time, with the statute of Provisors; and the statute contained a protestation, "That this assent, which is a *novelty*, and has not been done before this time, be not drawn into example or consequence for time to come." From thence they argued, there would have been no

* 1 Elizabeth, cap. 2.

need of this act, if, without it, the King could have dispensed with the Statute of Provisors. They then proceeded to give evidence of the records mentioned in the petition of the Bishops; those in the last King's time, in 1662, and 1672, and that in James's time, in 1685.

The Journal of the House of Lords, of the 18th of February, 1662, was produced by the keeper of it, and the King's Speech of that date was read, in which he expressed *a wish that he had a power of indulgence to use upon occasions.* They then ordered the Journal of the Lords of the 13th of March, 1662, to be read, and also a bill brought into the House of Lords, by which the King was to be enabled, under certain restrictions, to dispense with the Act of Uniformity.

They then produced in evidence the Journals of the House of Commons of the 25th and 27th of February, 1662; and from the proceedings, and address on the latter day, the opinion of the House appeared to be, that the Act of Uniformity could not be dispensed with without an act of parliament for that purpose.

They then, from the Journals of the House of Lords of the 5th of Feb. 1672, read the King's Speech, in which the King expressed his determination to adhere to the Declaration he had issued, for indulgence to dissenters. They then read from the Journals of the 13th of February, 1672, the address of the House of Commons to the King, in which they observed, "*and we find ourselves bound in duty to inform your Majesty, that penal statutes, in matters ecclesiastical, cannot be suspended but by Act of Parliament.*"

They also read the Journal of the 24th of February, 1672, by which it appeared, that in answer to the foregoing address,

the King said, amongst other things, "*Neither does he pretend to the right of suspending any laws, wherein the properties, rights, or liberties, of any of his subjects are concerned, nor to alter any thing in the established doctrine or discipline of the Church of England.*"

They then read out of the Commons Journal of the 26th of February, 1672, an answer to the King's message, in which, amongst other things, the Commons observe, "We find that the said answer is not sufficient to clear the apprehensions that may justly remain in the minds of your people, by your Majesty's having claimed a power to suspend Penal Statutes in matters ecclesiastical, and which your Majesty does still seem to assert in the said answer, to be intrusted in the Crown, and never questioned in the reigns of any of your ancestors, wherein we humbly conceive your Majesty has been very much misinformed, since no such power ever was claimed or exercised by any of your Majesty's Predecessors; and if it should be admitted, might tend to the interrupting the free course of the laws, and altering the legislative power, which hath always been acknowledged to reside in your two Houses of Parliament."

They then gave in evidence, the Lords Journal of March 1, 1672, by which it appeared, that the King communicated the address to the House of Lords, and desired their advice; and they also produced, the Journals of the 3d, 4th, and 8th. In the King's Speech on the 8th, he said, "If there be any scruple remaining with you concerning the suspension of Penal Laws, I here faithfully promise you, that what has been done in that particular, shall not for the future be drawn either into consequence or example." And, with the King's leave, the Chancellor informed the house, that "his Majesty had, the last night, in pursuance of what he then intended and declared this morning, concerning the suspension of Penal Laws, not being for

the future, drawn either into consequence or example, caused the original Declaration under the Great Seal, to be cancelled in his presence, whereof himself and several other Lords of the Council were witnesses."

They then read the Lords Journal of the 10th of March, 1672, whereby it appeared, that what the Lord Chancellor had said, was ordered to be entered on the Journals.

They then proceeded to read the Lords Journal of the 9th of November, 1685, by which it appeared, from the Speech of the King, that he had dispensed with the test, on behalf of some officers in the army. They also read the Journals of the House of Commons of the 16th of November, 1685, by which it appeared, that in an address to the King, the house observed, "We do, out of our bounden duty, humbly represent unto your Majesty, That those officers, cannot by law, be capable of their employments, and, that the incapacities they bring upon themselves thereby, can no ways be taken off but by act of parliament:" and they also say, they are preparing a Bill of Indemnity for the officers.

They then read part of the 1 Eliz. cap. 2.

In addition to the foregoing evidence, Sir Robert Sawyer observed, that in the reign of Henry IV. there was an Act of Parliament that foreigners should have a free trade in the city of London, notwithstanding the franchises of London: after the parliament rose, the King issued out his proclamation, forbidding the execution of that law, and commanding that it should be in suspense, *usque ad proximum parliamentum;* yet that was held to be against law*.

In this stage of the cause, Mr. Somers, "the accurate Mr. Somers," as Echard characterizes him†, addressed the

* Sir Robert, it is observable, cited no authority for this case.

† 3 Vol. Echard's History, 872.

Judges and the Jury. His speech, though very brief, was well calculated to answer its object, and displayed to the world those symptoms of superiority, which, like streaks of light at the dawn of day, bespeak the approach of greater and more powerful effulgence.

" My Lord—I would only mention the great case of Thomas and Sorrell*, in the Exchequer-Chamber, upon the validity of a dispensation of the statute of Edward VI. touching selling of wine. There it was the opinion of every one of the Judges, and they did lay it down as a settled position, that there never could be an abrogation, or a *suspension*, (which is a temporary abrogation,) of an act of parliament, but by the legislative power. That was a foundation laid down quite through the debate of that case. Indeed it was disputed, how far the King might *dispense* with the penalties in such a particular law, as to particular persons; but it was agreed *by all*, that the King had no power to suspend any law: and, my Lord, I dare appeal to Mr. Attorney General himself, whether, in the case of Godden and Hales†, which was lately in this court, to make good that dispensation, he did not use, as an argument then, that it could not be expounded into a suspension: he admitted it not to be in the King's power to suspend a law, but that he might give a dispensation to a particular person, was all that he took upon himself to justify him at that time.

* This great case is reported by Vaughan, in his Reports, p. 330. It is well worth reading, as are most of the cases in Vaughan. It is also reported in Levinz, Hardress, and Keeble. Chief Justice Vaughan was a very wise and upright Judge, and of very noble and enlightened principles and conduct. He was a firm friend to his King, and the rights and liberties of the people.

† This was the case of *Sir Edward Hales*, before alluded to, *ante*, p. 134. The case may be found in Hargrave's edition of the State Trials; and also in the 11th vol. of the late excellent edition of the State Trials, by Mr. Howell, p. 1166.

"My Lord, by the law of all civilized nations, if the Prince does require something to be done, which the person, who is to do it takes it to be unlawful, it is not only lawful, but his duty, *Rescribere Principi*. This is all that is done here, and that in the most humble manner that could be thought of. Your Lordships will please to observe how far it went, how careful they were that they might not any way justly offend the King. They did not interpose by giving advice, as Peers. They never stirred till it was brought home to themselves. When they made their petition, all they beg is, that it may not so far be insisted upon by his Majesty, as to oblige them to read it. Whatever they thought of it, they do not take upon them to desire the Declaration to be revoked.

"My Lord, as to matters of fact alleged in the said petition, that they are perfectly true, we have shewn by Journals of both Houses. In every one of these years, which are mentioned in the petition, this power of dispensation was considered in parliament, and, upon debate, declared to be contrary to law: there could be no design to diminish the prerogative, because the King hath no such prerogative. Seditious, my Lord, it could not be, nor could possibly stir up sedition in the minds of the people, because it was presented to the King in private and alone: false it could not be, because the matter of it is true: there could be nothing of malice, for the occasion was not sought: the thing was pressed upon them: and a libel it could not be, because the intent was innocent, and they kept within the bounds set by the act of Parliament, that gives the subject leave to apply to his Prince by Petition, when he is aggrieved."

The forceful manner in which Mr. Somers addressed the jury, though not, perhaps, to be compared with the master-

pieces of Demosthenes and Cicero, as Granger seems to imagine*, was well calculated to make a considerable impression; nor does the speech suffer by a comparison with the speeches of the coadjutors of Mr. Somers. It is said, indeed, to have been more noticed than the arguments of the other and older lawyers†. With the addition of some new, and important matter, it is a short but impressive summary of the arguments that had been used on the part of the Bishops. To have gone further into detail, would not have suited either the modesty of the advocate, the impatience of the court, or the wearied attention of the jury.

The able author of the *Caveat against the Whigs*, a cotemporary writer, and unfavourable to the Whigs, is yet compelled to admit, that the new assumed, dispensing power, was learnedly and boldly argued, and demonstrated to be a violation of the laws and constitution of the kingdom; "and especially," says he, "by one, (meaning Mr. Somers,) who was then one of the brightest ornaments of the law, and whose virtues now‡ add a lustre to the coronet he wears§."

After Mr. Somers had concluded his speech, the Attorney General rose. He denied that the proceedings in parliament, in 1662, 1672, and 1685, of which evidence had been given, were proof the King had no dispensing power; for a Declaration in parliament to be of any legal effect, must be by King, Lords, and Commons; and as to the act of parliament

* Granger's Biogr. History, 4 vol. p. 313.

† Life of Lord Somers, p. 17.—Cunningham mentions only the eloquence of Mr. Somers, [1 vol. Cunningham's History, p. 82.] And Mr. Hume, in stating the arguments of the counsel for the Bishops, seems principally to have been guided by his speech.

‡ The Work was published in 1712.

§ Caveat against the Whigs, second part, p. 49.

in the time of Richard the Second, he said there were 40,000 men in arms against the King, and that he was afterwards deposed.

He contended, that whether a libel be true or not, did not signify. He seemed to admit that the subject might petition; but the Solicitor General who spoke after him, denied that the Bishops, out of parliament, had a right to present any petition to the King. Upon this, Mr. Justice Powell observed, "My Lord, this is strange doctrine! shall not the subject have liberty to petition the King but in parliament? If that be law, the subject is in a miserable case."

Lord Chief Justice—"Brother, let him go on, we will hear him out, though I approve not of his position."

The Solicitor General then contended, that "for ought appears," the statute of Richard might be a declaratory act, and if so, it was a proof of the King's prerogative of dispensing. He admitted that, "if any thing comes judicially before the Lords, either by writ of error, or by natural appeal from any of the other courts, or by adjournment, and there be any judgment given, that is a declaration in parliament, and may be fairly so called;" but he denied, as the Attorney General had done, that the proceedings in parliament, in 1662, 1672, and 1685, could be considered as amounting to effectual declarations of the law.

He contended, the King might issue proclamations, and make constitutions and orders, in matters ecclesiastical, without the parliament and out of parliament, and that the King's Declaration, was in effect, a proclamation in ecclesiastical matters, and therefore legal, and that it was sedition to petition as the Bishops had done.

Serjeant Baldock followed the Solicitor General, but added

nothing of importance. He was followed by the Recorder, Sir Bartholomew Shower, who contended, that as the petition of the city of London was reckoned libellous*, so was this petition of the Bishops; and Serjeant Trinder insisted that, according to Sir Edward Hale's case, the King had a power to dispense with penal laws.

The Lord Chief Justice then summed up the evidence; he recapitulated, very fairly, the evidence that had been given, and then observed, in allusion to the dispensing power—

"The truth of it is, the dispensing power is out of the case, it is only a word used in the petition; but truly I will not take upon me to give my opinion in the question, to determine that now, for it is not before me: the only question before me is, and so it is before you, gentlemen, it being a question of fact, whether here be a certain proof of a publication; and then the next question is a question of law indeed, whether, if there be a publication proved, it be a libel?

"Gentlemen, upon the point of the publication, I have summed up all the evidence to you; and if you believe that the petition which these Lords presented to the King, was this petition, truly I think that is a publication sufficient; if you do not believe it was this petition, then, my Lords, the Bishops are not guilty of what is laid to their charge in this information, and consequently there needs no inquiry whether they are guilty of a libel? But if you do believe that this was the petition they presented to the King, then we must come to inquire whether this be a libel.

"*Now, gentlemen, any thing that shall disturb the government, or make mischief and a stir among the people, is certainly the case of* LIBELLIS FAMOSIS; and I must, in short, give you my

* He here alludes to the *Quo Warranto* cases.

opinion, I do take it to be a libel; now this being a point of law, if my brothers have any thing to say to it, I suppose they will deliver their opinions."

Mr. Justice Holloway said—"The end and intention of every action is to be considered;" he thought there was no ill intent in the petition; that, "to deliver a petition cannot be a fault, it being the right of every subject to petition." He thought it was not a libel.

Mr. Justice Powell said, there was nothing in the petition false, malicious, or tending to sedition. "Gentlemen," says he, "we must consider what they say is illegal in it. They say, they apprehend the declaration is illegal, because it is founded upon a dispensing power, which the King claims, to dispense with the laws concerning ecclesiastical affairs.

"*Gentlemen, I do not remember in any case in all our law, (and I have taken some pains upon this occasion to look into it,) that there is any such power in the King;* then that can be no libel which they presented to the King, which says, that the Declaration, being founded upon such a pretended power, is illegal.

"Now, gentlemen, this is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws, for I can see no difference, nor know of none in law, between the King's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament, all the legislature will be in the King, which is a thing worth considering; and I leave the issue to God and your consciences."

Mr. Justice Allybone said—"*I think, in the first place, that no man can take upon him to write against the actual exercise of the government, unless he have leave from the government, but he*

makes a libel, be what he writes true or false; for, if once we come to impeach the government, by way of argument, it is the argument that makes it the government or not the government: so that I lay down that in the first place, that the government ought not to be impeached by argument, nor the exercise of the government shaken by argument; because I can manage a proposition in itself doubtful, with a better pen than another man; this, say I, is a libel.

"Then I lay this down for my next position, *that no private man can take upon him to write concerning the government at all; for what has any private man to do with the government, if his interest be not stirred nor shaken?* It is the business of the government to manage matters relating to the government; it is the business of subjects to mind only their own properties and interest. If my interest is not shaken, what have I to do with matters of government? They are not within my sphere. If the government does come to shake my particular interest, the law is open for me, and I may redress myself by law: and when I intrude myself into other men's business that does not concern my particular interest, I am a libeller*."

The trial continued from nine in the morning till seven in the evening. The jury withdrew, and, without either fire or candle, sat up all night, rather, as Rapin supposes, from notions of decency, than doubt and hesitation. But a letter published in Macpherson's State Papers†, out of Bishop

* The Trial of the Seven Bishops is to be found in the 4th vol. State Trials, p. 304 to 396. Hargr. edit.

† "John Ince, to the Archbishop of Canterbury.

"May it please your Grace, "June the 30th, 1688.

"We have watched the jury carefully all night, attending without the door on the stair head. They have, by order, *been kept all night without fire or candle,*

Tanner's collection, proves there was some difficulty respecting their verdict, owing to the obstinacy of one Arnold, *the*

save only some basins of water and towels, this morning about four. The officers and our own servants, and others hired by us to watch the officers, have and shall constantly attend, but must be supplied with fresh men to relieve our guard, if need be.

"I am informed, by my servant and Mr. Granges, that, *about midnight*, they *were very loud one among another; and that the like happened about three this morning, which makes me collect they are not yet agreed.* They beg for a candle to light their pipes, but are denied.

"In case a verdict pass for us, which God grant, in his own best time, the present consideration will be, *how the jury shall be treated. The course is usually each man so many guineas, and a common dinner for them all.* The quantum is at your Grace's and my Lord's desire. But it seems, to my poor understanding, that the dinner might be spared, lest our watchful enemies should interpret it against us. It may be ordered thus, each man guineas for his trouble, and each man a guinea over for his own desire.

"My Lord,

"Your Grace's most humble servant,

"John Ince.

"N. B. *There must be* 150 *or* 200 *guineas provided.*" [See Macpherson's State Papers, vol. 1, p. 154. who cites Tanner's collection in Bod. Lib. vol. 28.]

A jury to be treated! To have a dinner and money! It shocks our present notions of propriety. Sir Thomas Smith mentions, in his time, that it was usual for the party who obtained the verdict, to give the jury a dinner. [See his Common Wealth, p. 156.] "And this," says he, "is all they have for their labour, notwithstanding that they come, some twenty, some thirty or forty miles, or more, to the place where they give their verdicts, all the rest is at their own charge." See the 38 Edw. I. st. 1, ch. 12, and the 34 Edw. III. c. 8, which make it penal, for jurors to take rewards for their verdict. In criminal matters, *not capital*, the jury were, heretofore, paid if they acquitted the prisoner, but not if they found him guilty; but in the prosecutions for the Popish Plot, in Charles the Second's reign, the jury had more, and were treated higher, if they convicted a prisoner, than if they acquitted him. In capital matters, it was never allowed to pay the jury, be their verdict which way it would.

According to the false reasoning of Hobbes, *after-bribes* are justifiable. "If he whose private interest is to be debated and judged in the assembly, make as

*King's brewer**. The next morning, at nine o'clock, they pronounced the Bishops, "Not Guilty." The verdict was received, with such shouts of joy and acclamation, as made the roof of the court almost crack, and it was with much difficulty the people could be quieted†. Illuminations and public rejoicings took place throughout every part of the kingdom; all was exultation. The popularity of the counsel for the Bishops may be easily conceived.

It was the saying of the Seymours, in the reign of Edward the Sixth, that in the throng of courtiers, there are but three steps to raise a man to observation; first, some peculiar sufficiency; secondly, some peculiar exploit; and thirdly, an especial friend. Not one of these only, but all of them now concurred, in favour of Mr. Somers's advancement. He had shewn, by his writings and speeches, a *peculiar sufficiency*—the Duke of Shrewsbury was to him, an *especial friend*—and his conduct on the prosecution of the seven Bishops, was, certainly, a *peculiar exploit*.

The trial of the seven Bishops was, in its issue, of the utmost importance; whether we consider it, as it regarded, the suspend-

many friends as he can; in him it is no injustice, because in this case he is no part of the assembly. And though he hire such friends with money, (unless there be an express law against it,) yet it is not *injustice*. For some times, as men's manners are, justice cannot be had without money, and every man may think his own cause just till it be heard and judged." [Hobbes Leviathan, p. 112.] The logic of Father Foigard, in the *Beau Stratagem*, was not so ingenious as that of Hobbes. When he endeavours to bribe the lady's maid, she says, "Won't the money look like a *bribe*, doctor." He replies, "if you receive the money before hand 'twill be *logicé* a bribe; but if you stay till afterward, 'twill be only *a gratification*." Fine reasoning!

* Letter of Mr. Price, 1 vol. Macpherson's State Papers, p. 265. A strong proof this of the propriety of securing, by law, an *impartial* jury.

† Rapin, vol. 12, p. 110.

ing and dispensing powers—the right to petition—the doctrine as to libel—the rights of juries—or the maintenance of the Protestant religion.

A limited dispensing power, (however suspicious in its origin,) had undoubtedly been often exercised and admitted, but not, as Mr. Hume so untruly says, "never questioned:" but a *suspending* power never had been acknowledged by the Judges. This distinction is broadly laid down by Mr. Somers, in his speech for the Bishops, and has not been sufficiently attended to by writers on the subject*. Supposing the judgment in Hales's case was right, (though it may be proved it was not,) yet it did not justify James's Declaration. Chief Justice Herbert, who presided on Hales's case, expressly says, in his Vindication of the Judgment in that case, "that a dispensation in its nature is particular, and given to particular persons by name; which is all the power that is attributed to the King by our judgment. And this I mention because of an unreasonable mistake of most people that talk of the dispensing power, as though the King's Declaration of *liberty of conscience*, whereby all the laws that concern religion are at once totally *suspended* and laid asleep, were warranted by it†."

* Mr. Justice Blackstone, for instance, is not quite correct in saying, [1 vol. Comms. p. 141.] that, "by the 1st. Wm. and Mary, stat. 2, cap. 2, it is *declared* that the pretended power of *suspending* or *dispensing* with laws, or the execution of laws, by regal authority, without consent of parliament, *is illegal*." It was not so declared. It was *declared* that the *suspending* power was illegal; but the *dispensing* power was declared to be illegal only, *as it had been assumed and exercised of late*, thereby admitting, that a dispensing power, in some cases, was legal; and an express provision in the act became necessary, in order to take away, *for the future*, a dispensing power in all cases. The same mistake is reiterated in the 4th vol. Comms. p. 440.

† Vide Sir Edward Herbert's Vindication of the Judgment in Hales's case, 7th vol. State Trials, p. 617.

The dispensing power was much argued, but the decision of the jury could not, properly, be considered, either as an affirmance or disallowance of that power; for whether there was a suspending or dispensing power, or not, yet the intentions of the Bishops were clearly innocent, and their petition, therefore, no libel.

I shall not enter into this subject any farther, at present, as it will be necessary to consider it, more at large, hereafter, in the comments on the Bill of Rights.

The doctrine of some of the Judges, in the Bishops case, relative to *libels*, was not a little remarkable. The Chief Justice, we have seen, laid it down, that any thing "that disturbed the government, or makes mischief, or a stir among the people," was a libel. What a dreadful want of precision in this doctrine! Mr. Justice Allybone was more explicit. According to him, it was libellous "to write against the actual exercise of the government, unless he have leave from the government!" As if any man would apply for leave to write against the government. His next "plain proposition," as he called it, was, "that *no private man* can take upon him to write concerning the government! Such was the strange doctrine, at this period, relative to libel: and in support of which, the case *De Libellis Famosis**, was quoted. It must be owned, that some of the doctrines in that Star-Chamber case, were very loose and unguarded, and were, most of them, extrajudicial, and borrowed from an exceptionable part of the civil law: and yet this case appears to have been the foundation of all our libel law†! By the *civil* law, it was considered as a

* 5 Rep. p. 125.

† See Barr. Observations on the Stats. p. 95, &c. See also Mr. Dunning's tract, intitled, "Letter concerning Libels, Warrants, &c." p. 33.

sort of sacrilege to doubt of the merit of any person whom the first magistrate thought proper to dignify with office*. Sejanus, himself, was *by law*, a pure and upright man! What could be expected from so servile a pattern?

The doctrine of libel is still very unsettled, and, from its nature, must, I fear, be always liable to fluctuate, for it is hardly possible to lay down any certain rules. It is to the honesty and good sense of juries that the subject must look for his chief security, and it does seem, that some legislative enactments are still wanting, the more effectually to secure an independent jury. The *Arnolds* should be excluded from the jury box†.

It does not distinctly appear, whether the jury returned the verdict they did, because they thought the *publication* of the libel was not sufficiently proved, or because they thought the petition did not amount to a libel. Probably, it was on the latter ground that they delivered their verdict, for all the Judges seemed to have thought, the *publication* was sufficiently proved. On this great trial, it is very observable, that the court, (composed even as it was,) left to the jury, both the consideration of the *law* and of the *fact*, and to their immortal honour, the jury exercised their immemorial right of deciding upon both; and as they thought, either that the publication was not sufficiently proved, or that the petition of the Bishops was not a libel, and contained, "nothing of sedition, nothing of malice, nothing of scandal in it; nothing of the salt, and vinegar, and pepper, put into the case," as one of the counsel expressed it‡, they declared the Bishops Not Guilty. A most important

* Disputare de principali judicio non oportet. Sacrilegii enim instar est dubitare an is dignus sit quem Imperator elegerit. [Co. de Crim. Sacrileg.]

† See what is said on this subject, in the Edinburgh Review, Number 35.

‡ See Sir Robert Sawyer's Speech on the Seven Bishops case.

decision! This trial was, with great force, placed in the front of the argument of those, who, in the present age, have vindicated the right of juries to return a *general verdict;* and it is not the least of the advantages afforded by the decision on that memorable day. How important a trial! By this one decision, the suspending and dispensing powers received their death blow, and the rights of juries, and the liberty of the press, were established on their ruins!

Mr. Somers, in his celebrated tract upon the "*Duties of Grand Jurors,*" maintained, as we have before seen, the same doctrine. "As it hath always been the law, so it hath always been the custom and practice of these juries, (the petit juries,) upon all general issues pleaded in cases, civil as well as criminal, to judge both of the law and the fact." In a tract intitled, "*The Judgment of whole Kingdoms, &c.*" attributed to Lord Somers, and noticed more particularly hereafter, he repeats the same doctrine. "According to Magna Charta, judgments are to be passed by equals: no man can be imprisoned, disseised of his freehold, deprived of life or limb, unless by sentence of his peers. And Bracton says, that in receiving justice the King is equal to another man: which could not be, if judgments were given by him, and he were exempted from the judgment of all by that law, which has put all judgments into the hands of the people. This power is executed by them, in grand or petty juries, and the Judges are assistants to them, in explaining the difficult points of the law, in which, it is presumed, they should be learned. The strength of every judgment consists in the verdict of these juries, which the Judges do not give, but pronounce or declare. And the same law that makes good a verdict given contrary to the advice or direction of the Judges, exposes them to the

penalties, if upon their own heads, or a command from the King, they should presume to give sentence, without, or contrary to a verdict; and no pretensions to a power of interpreting the law, can exempt them if they break it: nay, even in special verdicts, the Judges are only assistants to the juries, who find it specially, and the verdict is from them, though the Judges having heard the point argued, declare the sense of the law thereupon*." It is somewhat surprising, that in the modern discussion of this doctrine, these tracts of Mr. Somers were not adverted to, by the defenders of the rights of juries. That juries have no right to return a general verdict, in cases of libel, was a favourite doctrine of the odious *Star Chamber*†. Even that great man Lord Clarendon, (for great

* Somers's "Judgment of whole Kingdoms," sect. 81.

† Lord Somers, in a speech of his, observed of this court, "We had a *Privy Council* in England, with great and mixed powers; we suffered under it long and much; all the rolls of parliament are full of complaints and remedies; but none of them effectual till Charles the First's time. The *Star Chamber* was but a spawn of our council, and was called so, only because it sat in the usual council chamber. It was set up as a *formal court*, in the third year of Henry the Seventh, in very soft words, 'To punish great riots, to restrain great offenders, too big for ordinary justice, or in the modern phrase, to preserve the public peace.' But in a little time it made the nation tremble. The Privy Council came at last to make laws by proclamation, and the Star Chamber ruined those that would not obey; at last they fell together, but not without endangering the nation." [2 Vol. Hard. State Papers, and also 4 vol. Hatsell's Precedents, p. 65.]

According to Lord Bacon, the authority of the Star Chamber subsisted by the *ancient common law of the realm*, and was only *confirmed* in certain cases, by the act of Henry the Seventh. [Bacon's Life of Henry the Seventh, 3 vol. of his Works, p. 426, folio edition.] Bacon is lavish in his praise of that court. "This court," says he, "is one of the sagest and noblest institutions of this kingdom, for in the distribution of courts of ordinary justice, (besides the high court of parliament,) in which distribution, the King's Bench holdeth the pleas of the Crown, the Common Pleas, Pleas Civil, the Exchequer Pleas, concerning the

he was, in all but his intolerance,) seems to have been infected with the same doctrine. Hobbes, who in general appears particularly fallible, when he discourses on subjects of law, and is over favourable to tyranny, has, notwithstanding, expressed

King's revenue, and the Chancery the Pretorian power for mitigating the rigour of law, in case of extremity, by the conscience of a good man; there was, nevertheless, always reserved, a high and pre-eminent power to the King's Council, in causes that might, in example or consequence, concern the state of the Commonwealth, which, if they were criminal, the Council used to sit in the chamber called the Star Chamber; if civil, in the White Chamber, or Whitehall. And as the Chancery had the Pretorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital. This court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, Counsellors, Peers, Prelates, and Chief Judges. It discerneth also principally of four kinds of causes; forces, frauds, crimes various, of steltionate, and the inchoations or middle acts, towards crimes capital or heinous, not actually committed or perpetrated. But that which was principally aimed at by this act, was force, and the two chief supports of force, combination of multitudes, and maintenance or hardships of great persons."

"The High Commission, and the Star Chamber," says Hurd, "were the two arms of absolute dominion, which, at different times, and under different pretences, were stretched forth to the oppression of every man that presumed to oppose himself to the royal will or pleasure." [Hurd's Dial. 2 vol. 286.]

The Star Chamber differed most materially from all the other courts of law in this; the latter were governed only by the common law, or immemorial custom, and acts of parliament: whereas the former admitted, for law, as Lord Somers observes, the proclamations of the King in Council, and grounded its judgments upon them! [See treatise on the Court of Star Chamber, 2 vol. Collectanea Juridica, p. 107.] The abolition of this tribunal was therefore, justly looked upon, as a great victory over regal usurpation.

There is in Lincoln's Inn library, a MS. treatise on the court of *Star Chamber*, by Sir Thomas Mallet, one of the Judges of the King's Bench; in which he intitles it "the most ancient of any court of justice, and the mother-court of the kingdom."

Chief Justice Holt has observed, that the King's Bench possesses all the legal power the Star Chamber had. [9 vol. State Trials, p. 310.]

himself with remarkable correctness, respecting the functions of a jury. His words are these, "In the ordinary trials of right, twelve men of the common people, are the Judges, and give sentence, not only of the fact, but of the right; and pronounce simply for the complainant or for the defendant; that is to say, are judges not only of the fact, but also of the right; and, in a question of crime, not only determine whether done or not done, but also whether it be murder, homicide, felony, assault, and the like, which are determinations of law: but because they are not supposed to know the law of themselves, there is one that hath authority to inform them of it, in the particular case they are to judge of; but yet, if they judge not according to that, he tells them, they are not subject thereby to any penalty, unless it be made appear they did it against their consciences, or had been corrupted by reward*. This passage, written by such a man, so correctly, and so favourable to liberty, is (as I have observed,) in a very surprising manner, opposed by Lord Clarendon. Hobbes to be found writing in favour of liberty, and Clarendon against it! Like the combatants in Hamlet, they seem each of them, on this occasion, to have lost their arms, and, in the scuffle, Clarendon, some how, seems to have got hold of the poisoned weapon of the philosopher of Malmsbury. Lord Clarendon's answer to the passage quoted from Hobbes, is as follows: "To his other dictates of the office of Judge, that he needs not be learned in the laws, because he shall be told by the Sovereign, what judgment he shall give†; and of the laws of England, that the jury is judge of the law, as well as of the fact, there

* Hobbes Leviathan, p. 146.

† That opinion of Hobbes was, undoubtedly, false and absurd.

needs no more be said then that he is not informed, nor understands what he delivers, and whether his notions of the divine positive law be more agreeable to truth, will be examined hereafter*. Even in his History of the Rebellion†, Clarendon has a passage of a similar import. Judge Jermyn called the doctrine, that juries were judges of law, as well as fact, "*a damnable heresy*‡." This opinion, so favourable to tyranny, and tending, as Sir John Hawles well observed, "to defeat the principal end of the institution of juries, *and so subtilly to undermine that which was too strong to be battered down*§," was supported by the infamous Jefferies‖, and was again revived (and, perhaps, from a sense of duty, and with no bad intention) under the powerful auspices of Lord Chief Justice Mansfield. "Upon the *reason of the thing*," said he, "and *the eternal principles of justice*, the jury ought not to assume the jurisdiction of the law¶!" Happily, however, the spirit of Somers was not extinct! Noble defenders of the liberty of the press arose, whose genius, courage, and per-

* Survey of Leviathan, p. 129. † 2 Vol. 396, octavo edit.

‡ 2 Vol. State Trials, p. 26, 69. Lilburne's Trial, Hargr. edit.

§ Englishmen's Rights, p. 15, edition 1764. This work was first printed at the end of the reign of Charles the Second.

‖ See the Trial of Sir Samuel Barnardiston, before Chief Justice Jefferies. State Trials.

¶ It is a curious fact, that in the quarto edition of his Commentaries, published by Blackstone, in 1769, there was the following passage: "In such prosecutions (prosecutions for libel) the only *facts* to be considered, are, first the making or publishing of the book or writing; and secondly, whether the matter be criminal: and if both these points are against the defendant, then the offence against the public is complete." But in the subsequent editions, the word *points* was inserted, instead of the word *facts;* and as it seems, in conformity with Lord Mansfield's doctrine.

severance, baffled their opponents, and enabled them, triumphantly, to maintain the RIGHTS OF JURIES*.

The celebrated Spratt, Bishop of Rochester, who heard the pleadings of counsel in favour of the Bishops, was, or affected to be (for he was not one of your stubborn thinkers) so thoroughly convinced by their reasoning, that he observed in his second letter to the Earl of Dorset, "for my part, I must own I was so fully satisfied by the excellent pleadings of those great lawyers, at that trial, that I confess I never had, till

* The famous argument of the celebrated Lord Erskine, then Mr. Erskine, on behalf of the Bishop of St. Asaph, for a new trial, contains almost all the doctrine upon the subject, and is, undoubtedly, a most able and masterly discussion. His exertions on this, and other great occasions, and, in particular, on the State Trials, well entitle him to all the praise and all the honours he has received; and his memory will always be dear to the present age and to posterity. To such men, it is, that Great Britain owes its liberty and superiority. Never, never, may the spirit be extinct! In the course of the observations of counsel upon the Bishop of St. Asaph's case, it was truly asserted, respecting the petition of the seven Bishops, that "if the King's Judges could have decided the petition to be a libel, the Stuarts might yet have been upon the throne." Well might Serjeant Maynard say, that "*trial by jury was the subject's birthright and inheritance, as his lands are, and without which he is not sure to keep them or any thing else.*" "*This way of trial,*" says he, "*is his fence and protection against all storms of power, and against all frauds and surprises.*" [Vid. 1 vol. Grey's Debates, 447.] The celebrated author of Junius's Letters, uses the following exhortation. "Let it be impressed upon your minds, let it be instilled into your children, that the liberty of the press is the paladium of all the civil, political, and religious rights of an Englishman; and that the right of juries to return a general verdict, in all cases whatsoever, is an essential part of our constitution, not to be controuled or limited by the Judges, nor in any shape questionable by the legislature." [Dedication to Junius's Letters.] At length, however, it was thought necessary to bring in a bill, *declaratory* of the law of libel. [See Libel Bill, 32 Geo. III. cap. 60.] which completely settles the disputed or disputable points, and, in cases of indictments, or informations for libel, leaves not a loop hole for corrupt or ambitious Judges. More than once did that upright Judge, the late Lord Kenyon, observe, that *he*

then, so clear a notion of what unalterable bounds the law has fixed between the just prerogatives of the crown, and the legal rights of the subject*;" but we may fairly suspect, that the Bishop's logic was of a very courtly and accommodating nature.

Mr. Somers, on this great trial, defending the innocent, and with them, the liberty of his country, against the powerful attacks of a tyrannous court, was happily placed in the most exalted and glorious point of view, in which human nature can be exhibited! So noble a spirit, and so strong an understanding exhibited by him in the eyes of the world at his first appearance in it, were justly considered as presages of his future eminence. "I know not," says Paley, "a more exalted charity than that which presents a shield against the rapacity or persecution of a tyrant†. It was conduct like this, which Cicero so earnestly recommended to his son Marcus; as being the field from which the truest glory might be reaped. He felicitated himself upon having fallen into such a situation, by being called upon to defend Roscius

should have acted exactly the same before as after the Libel Bill, so very clear was he, respecting the doctrine. More than once, in my hearing, did he say, "*the Libel Bill was but a race for popularity*." Here, perhaps, he was wrong: a race for popularity! Might not another Clarendon, another Mansfield, another Buller arise, and with them, prejudices fatal to the rights of juries? Surely, with deference to that virtuous imitator of Hale, this is not the strain in which we should treat those benefactors of their country, the authors of the Libel Bill. Pure indeed he was, and to him may justly be applied, a passage in Ovid:——

"Non illo melior quisquam, nec amantior equi
Vir fuit."

* Biogr. Brit. tit Spratt, vol. 6. p. 3818.

† Paley's Moral and Political Philosophy, vol. 1. p. 244.

against Sylla, (the relentless and implacable Sylla,) even in the very heighth of his power*. With reference to this most arduous defence, and the reflections of Cicero upon it, Dr. Middleton, his admirable biographer, makes this very just observation. "As by this defence he acquired a great reputation in his youth, so he reflects upon it with pleasure in old age, and recommends it to his son as the surest way to true glory and authority, in his country." "A noble lesson," (continues Middleton) "to all advancers, to apply their talents to the protection of innocence and injured virtue: and to make justice, not profit, the rule and end of their labours†." A virtuous and exalted precept! enforced and illustrated not only by the conduct and success of Cicero, and a long train of other splendid characters; but also by that of the great man, of whose life, I am attempting a delineation‡.

The ill success of the prosecution of the Bishops, proved a great discomfiture to the Court; more so, indeed, than some of the good Bishops meant, if we may judge from their subsequent conduct. An effort of tyranny usually recoils upon an English monarch with a dreadful force. The suspending and dispensing power, had received their quietus, and the attempt which led to this great legal conflict, opened the eyes of all, and principally contributed to the general defec-

* "Maximè autem et gloria paritur et gratia defensionibus; eóque major, si quando accidit, ut ei subveniatur, qui potentis alicujus opibus circumveniri urgerique videatur: ut nos et sæpe aliàs, et adolescentes contra L. Syllæ dominantis opes pro Sex. Roscio Amerino fecimus; quæ, ut scis, extat oratio."

[Cic. De. Off. lib. 2. ch. 14.]

† Middleton's Life of Cicero, vol. 1. pp. 41, 2.

‡ See what Pliny says of himself, and the glorious part he acted. [Plin. Epis. lib. 4. epist. 18.

tion*. Painful as the effort might be, the people from this time, found it absolutely necessary to abandon their criminal monarch. There is truth in an observation, once made by a Frenchman to Temple, and recorded by him; a truth which, if properly attended to, might have saved James from disgrace and abandonment. "*Q'un Roi d'Angleterre qui veut être l'homme de son peuple, est le plus grand Roi du monde; mais s'il veut être quelque chose d'advantage, pas Dieu il n'est plus rien*†. Cheerfully are Englishmen found to embody themselves to repel, and to chastise, foreign insolence—cheerfully are they found to contribute their *quota* to the pecuniary exigences of the state—with fond patriotism do they circle their monarch, and are most careful of his prerogative, not merely from personal affection and prejudice, but from the just persuasion, that it is entwined with the safety of their own liberties: but illegal treatment, on the part of their governors, turns the tide of their affection; and is always found beyond their endurance. They love a king, but they detest a tyrant. Selden, somewhere justly observes of the English, that, "the only way to conquer them, is to let them have their liberties; for like horses, they are good for carriage as long as their burdens are easy, and sit loose upon them; but if too close girt, they will break all, or cast their load and die."

This is the present character of Englishmen, and such too was their temper in the earliest times, as appears from the

* See papers produced in evidence on the trial of Lord Preston, State Trials. See also 4 vol. d'Avaux Neg. p. 221.

† Temple's Works, 1 vol. p. 384. folio edit.—There is another just observation of his to this effect, "*If it be not necessary, it is for a king's ease and happiness, to content his people.*" 2 vol. p. 90.

description which Tacitus gives of them, in his interesting life of the excellent Agricola. *Ipsi Britanni delectum, ac tributa, & injuncta imperii munera impigre obeunt, si injuriæ absint : has ægre tolerant, jam domiti ut pareant, nondum ut serviant**. The attempt to snatch a vigour beyond the law, proved fatal to many English kings. It was so with King John, with Henry III. Edward II. Richard II. and Charles I. It was the undue assumption of a dispensing power by Richard II. which, as Bishop Lowth says†, "served only to alarm the people, to awaken them to a sense of the loss of their liberties, and to hasten the revolution, which was so easily brought about the year following, when Richard the 2d. was deposed, and Henry Bolingbroke, Duke of Lancaster, placed on the throne." Twice did Charles the 2d. attempt a dispensing power, and twice he was repulsed, as we have seen; but James, was not awed by these instances of disappointed tyranny; he vainly thought he could accomplish that which they had ineffectually attempted. What the sad sequel was, is well known. It is pleasing to observe the religious joy which universally prevailed, upon the acquittal of the Bishops. Atterbury, an eye witness, says, "The churches were filled with crowds of holy and grateful worshippers. The altars surrounded by unusual numbers of devout communicants. All ranks and conditions of men were remarkable for their piety and seriousness‡." The army was affected by the generous contagion. The vast military force encamped on Hounslow Heath, upon which James founded his chief

* Tacit. Julii Agricolæ vita, edit. Brotier, 4 vol. pp. 81, 2.

† Life of William of Wykeham, p. 261.

‡ See Atterbury's Sermon preached before the House of Commons, May 29th, 1701.

hopes*, vented its feelings in open acclamations, unseduced by the priests, who preached in a popish chapel introduced in the midst of the camp†. The king having reviewed the troops, and being seated at dinner in Lord Feversham, the General's tent, he heard the shouts of the soldiers, and inquired of the General the cause, who said, "it was nothing but the rejoicing of the soldiers for the acquittal of the Bishops." "Do you call that nothing," said the King, "but so much the worse for them." It was easily seen, by the exultation of the soldiers in this instance, as well as by their decisive conduct on other occasions, that James would not find in them, apt instruments of oppression. "It was easily seen," says the patriotic Welwood, "how impossible it is to debauch an English army from the love of their country and their religion‡." In the navy too, a similar spirit most strongly prevailed, and was manifested in a variety of instances§.

Whatever might have been the opinion of some fanatics, it clearly appeared by the manner in which the acquittal of the Bishops was received all over the kingdom, that the people in general, felt an abhorrence of the Catholic persuasion, and

* Rapin vol. 12. p. 61.

† It was the fashion at that time for the courtiers to pay frequent visits to the camp, and encourage the soldiers.

Here, says an anonymous poet,

"Here daily swarm prodigious wights,
And strange variety of sights,
As ladies lewd, and foppish knights,
Priests, poets, pimps, and parasites."

[Poem on the Camp at Hounslow.]

‡ Welwood's Memoirs, pp. 186-7.

§ Caveat against the Whigs.

dreaded its becoming the predominant religion of the state. It was as opposite to their humour, as to their interest. They considered it, as Addison has expressed it, "one huge overgrown body of childish and idle superstition*." But it was not so much the religious opinions of the Catholics that they found fault with, as their political tenets, which they considered wholly irreconcileable with spiritual and civil liberty. A Popish King and Minister, they were fully persuaded, would put into extreme hazard, the *estates*, *lives*, and *souls*, of the Protestant subject. In France, they saw the revocation of the Edict of Nantz, by Louis the Fourteenth, and that he justified it by the horrid doctrine, "that faith is not to be kept with Heretics†," what might they not expect if the Catholic religion was predominant in England? What security against so intolerant, so savage a superstition?

So inveterate was Milton against Popery, that, in his Treatise, "*Of true Religion, Heresy, Schism, &c.*" he excluded from his ample scheme of toleration, the church of Rome alone, whose idolatry he considered as an offence to the Christian name, and whose tenets he thought were as incompatible with the safety of any government, as they were with the existence of any body of dissentient Christians‡. But Lord Somers was far

* Spectator, Number 201.

† Vid. 1 vol. Cunningham's History, p. 68. See also Mr. Somers's "*Vindication, &c.*"

‡ Symmons's Life of Milton, p. 498. Milton's words are as follows, "Let us now inquire, whether Popery be tolerable or no. Popery is a double thing to deal with, and claims a two-fold power, ecclesiastical and political, both usurped, and the one supporting the other. But ecclesiastical is ever pretended political. The Pope, by this mixt faculty, pretends right to kingdoms and states, and especially to this of England: thrones and unthrones Kings, and absolves the people from their obedience to them: sometimes interdicts to whole nations the public worship of God, shutting up their

from being so intolerant: he considered Catholics as men. He considered those who adhered to the church of Rome as good Catholics and worthy of trust; but those who adhered to the court of Rome, he considered as Papists, enemies, and traitors, to the realm of England, and utterly unfit for trust in any Protestant government;* and there, perhaps,

churches; and was wont to drain away the greatest part of the wealth of this then miserable land, as part of his patrimony, to maintain the pride and luxury of his court and prelates; and now since, through the infinite mercy and favour of God, we have shaken off his Babylonish yoke, hath not ceased by his spies and agents, bulls and emissaries, once to destroy both King and Parliament; perpetually to seduce, corrupt, and pervert as many as they can of the people. Whether therefore it be fit or reasonable to tolerate men thus principled in religion toward the state, I submit it to the consideration of all magistrates, who are best able to provide for their own and the public safety. As for tolerating the exercise of their religion, supposing their state-activities not to be dangerous, I answer, that toleration is either public or private; and the exercise of their religion, as far as it is idolatrous, can be tolerated neither way: not publicly, without grievous and unsufferable scandal, given to all conscientious beholders: not privately, without great offence to God, declared against all kind of idolatry, though secret." 2 Vol. Milton's Works, fol. edit. p. 431.

A Prelate, now living, terms the doctrines and usages of the Papists, "*idolatrous, blasphemous, and sacrilegious*," and seems to doubt whether a Papist can be saved. [Vid. the Grounds, &c. by Shute, Bishop of Durham. Introductory Letter, page 8.]

* I have somewhere read this opinion of Lord Somers, but I am unable to turn to the tract. The opinion of King William, of Lord Somers and others, respecting the Catholics, may be seen in the following passage, in a memorial drawn by King William's special direction, (in answer to two memorials of James,) and intended to be given in at the treaty of Reswick. "When his, (King William's) opinion was asked concerning the repealing the laws that related to the Roman Catholics, he declared his thoughts very freely of those Penal Laws under which they lay by reason of their religion. He liked the notion of repealing them, which might have satisfied all those of that communion, as it did the more moderate of them. He did not think it advisable to repeal those other laws that excluded them from sitting in parliament, and from offices of trust. This proposition, if closed

lay the true distinction. Since the Revolution, lapse of time, length of adversity, and the prevalence of good sense, have much altered the doctrines of English Papists, and we, of this age, do not look upon Catholics with those dismal apprehensions, which our ancestors did, and with so much reason.

The hearts of the people were now turned against their King. The Muse of Dryden sung in vain. His *Hind* and *Panther*, (with all its inconsistencies,) might charm a lover of poetry, but could not convince the people of James's right to suspend the *Test Laws*. The more they reflected, the more they were persuaded that a King was not appointed such for himself only. They abjured,

"Th' enormous faith, of Millions made for One."

They felt the truth of the doctrine, "*Rex datur propter Regnum, et non Regnum propter Regem quo omni potestas Regni referri debet ad bonum Regni.*" They felt persuaded that he had indeed a divine right to do good, but could never, with propriety, urge a divine commission to do wrong, and that "subjects have, in their several public and private capacities, as legal a title to what are their rights by law, as a Prince to the possession of his crown*." James, however, was deaf to all the demonstrations of the sense of his people, and preferred the advice of private whisperers, to the "grand chorus of the

with, would have made the Roman Catholic subjects safe and easy; *and if they had behaved themselves so well upon such a favour, as to put an end to the jealousies of the nation, they might after that, have pretended to further degrees of confidence with a better grace;* for it gave too just an occasion to jealousy when all was asked at once: and it was said, all or nothing."

* Vid. General Stanhope's Speech on Sacheverell's Trial.

national voice," and thereby came under the lash of Old Bracton, who has expressively said, "*Exercere debet Rex potestatem juris, ut vicarius et Minister Dei, potestas autem injuriæ, diaboli est non Dei; cum declinat ad injuriam Rex, diaboli Minister est**."

The eloquent South, in a sermon preached at Westminster Abbey, on the fifth of November, 1675, made use of prophetic language; "For as it is said, Prov. 21, 1. 'That the heart of the King is in God's hand, and that, as the rivers of water, he turneth it which way so ever he will:' so are the hearts of the people too, which, like a mighty stream or torrent, He turns this way or that way, according to the wise counsels of his Providence. For if He intends to advance a Prince, they shall be a stream to bear him up from sinking; if to forsake or ruin a Prince, they shall overflow, and swell, and rush in upon him, with such a furious ungoverned tide, as no power or arts of state shall be able to divert or withstand. God can turn the hearts of a nation, suddenly and irresistibly. He has done so more than once or twice, and may do so again†." Events shewed the justness of the reasoning of the eloquent preacher.

* Bracton, de Legibus.

† 1 Vol. South's Sermons, p. 493, fol. edit.

END OF THE THIRD BOOK.

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BOOK IV.

We have seen Mr. Somers emerging, by degrees, from obscurity, into distinguished notice. We have seen unequivocal proofs of his unwearied industry, and great acquirements, and above all, of his great taste and genius. We have seen him, in his writings, sometimes courting the Muses; at other times, using mighty powers of argument, to arouse the nation to a serious, solemn sense of its rights and liberties; and on all these occasions, exhibiting great reading and extraordinary compass of mind. We have also seen him acting, in the ablest manner, the part of an advocate, and proving that his tongue was as eloquent as his pen. In the history of his life, as well as in that of many others, we clearly find refuted, an observation often made, and too generally applied, "that men of genius are unfit for business."

We are now arrived at the eventful æra of the Revolution, and here we shall find the conduct of Mr. Somers deserving of the highest eulogium. Never, indeed, did he shine more conspicuously than at that eventful period!

A writer who finds it necessary to comment upon the Revolution, must be possessed of a very little, or a very great mind, if he does not feel himself in a situation of delicacy and difficulty. The Revolution is the great crisis in our history, towards which, all eyes should be directed. "*THE ANCIENT VIRTUE OF THE ENGLISH NATION EXERTED ITSELF; AND SHONE OUT IN ITS GREATEST LUSTRE IN THAT GLORIOUS WORK**." It is here the politician should take his stand. This is what Lord Bacon would call the "vantage ground" in politics. Here it is he will find errors exploded, and wise principles, sifted from the rubbish of former times, recognized and declared. At no period before, was civil liberty so clearly defined and understood: the rights of the different branches of the legislature ascertained, and the free spirit of our constitution felt and acknowledged. It is, says Mr. Fox, "*the brightest æra of freedom known to the annals of our country*†," and happy indeed, would it have been for that country, if so enlightened a statesman, and so excellent a writer, had lived to complete the noble design he had formed, of illustrating the transactions of this period, and of "impressing on mankind those maxims, applicable to all times, which are to be drawn from that memorable occurrence‡." We should then have seen, in part accomplished, that "*right good constitutional History of England*," which Hurd so justly thought "would be the noblest service that any man, duly qualified for the execution of such a work, could render to his country§."

* Vid. Lechmere's Speech on Sacheverell's Trial, p. 23, fol. edit.

† See Fox's Historical Work, p. 58.

‡ See Lord Holland's Address, prefixed to Mr. Fox's Historical Work, p. 6.

§ Hurd's, (afterwards Bishop of Worcester,) Dialogues, 2 vol. p. 88, 8vo. edit.

The good nature, and occasional credulity of the English, were never, perhaps, more apparent, than at the accession of James. On all sides he was welcomed. It seemed as if it were true in morals, as in law, that the descent of the crown purges all defects. The nation appeared to have forgotten all past errors, and seemed to place unbounded confidence in all the fair professions of the new Monarch. The many, pleased with novelty, were full of joy; but the discerning few, clearly foresaw what would follow, and justly judged of the future by the melancholy experience of the past. They were fully aware, that a man of an age so advanced, (for James was now one and fifty,) and after such a long course of determined bigotry, would not suddenly change his sentiments, and just at a time too, when a devolution of power enabled him best to give them effect. A wise King would have profited by the enviable situation on which James found himself placed at the commencement of his reign. *Abroad*, nothing was to be feared; foreign Princes courted his friendship, and considered him as the arbiter of Europe's differences. *At home*, every thing was flourishing, and men appeared, with an unseemly servility, vying with each other, who most should show submission. The kingdom was in peace, and there was every prospect of its continuance. The revenue had been improved, and was improving. Trade was flourishing, and the spirit of improvement alive and vigorous.

The navy too, the floating bulwark of England, was in excellent condition. But all these advantages were over looked, and James no sooner began to reign, than he determined, by means arbitrary, unconstitutional, and hypocritical, to establish his darling superstition. The remark of Father Orleans is just, in that part of his work where he enumerates the ad-

vantages which James enjoyed at his accession: "all these," says he, "seemed to be something more than bare omens of a peaceful and happy reign, and they must infallibly have been so, had not King James been a Catholic." James declared to Father Clare, that he would convert England, or die a martyr; and that he should prefer the life of one day only, with the comfort of having converted his people, before a reign of fifty years, without that consolation*. *Hinc illæ lacrymæ.*

Addison observes, "that James was endowed with many royal virtues, and might have made a nation of *Roman Catholics* happy under his administration. *The grievances we suffered in his reign, proceeded purely from his religion*†." This character is rather too lenient. Much of the ill conduct of James had no relation to his religious views; but certainly the propagation of his religion seems to have been *first*, *last*, and *midst*, in his mind.

From the time of Henry VIII. when the supremacy of the Church of Rome was renounced, and the Protestant profession established, there had been a series of conspiracies and attempts against it. In *Mary's* reign, the Papists exulted. The Pope's supremacy was restored by a packed parliament‡, and lucky it was for England, that this female bigot proved barren. In Elizabeth's reign the Protestant religion was again revived, and glory and honour accompanied her sway, notwithstanding all the plots of her Popish enemies, with the

* 4 Vol. D'Avaux Negotiations, p. 122. See also 1 vol. Somers's Tracts, p. 249.

† Freeholder, Number 36.

‡ This was so notorious, that, in Queen Elizabeth's time, it was doubted whether or no to declare, by act of parliament, all the acts of that parliament to be void; but that course was, from prudential considerations, declined.

beautiful but imprudent Mary at their head. In James the First's time, the Protestant faith acquired fresh security from the detection of the infamous powder plot. In the reign of Charles the First, popery and arbitrary power again shewed their dire fronts. In Rushworth is exhibited a long list of the offices given in this reign to Papists. The ferocious and unbridled times that followed, and the gloomy triumph of Presbyterianism, is well known. Charles the Second, at length, was miraculously restored: so much so, indeed, that the Lord Keeper, Sir Heneage Finch, justly observed, "he was a Prince in whose style, *Dei Gratiâ* seemed not to be written by a vulgar pen, but by the arm of Omnipotence itself*." Yet the careless profligate forgot the lessons he had learned in his exile. We cannot blame either Charles the Second, or his brother James, merely because they were Catholics. Their religious persuasion, (if sincere,) was rather to be pitied by those who were, (or thought themselves,) wiser and better, and considered rather as a misfortune than stigmatized as a crime. We cannot command our consciences, or force our judgments. We cannot think as we please. But the misfortune was, that not satisfied with being a Catholic, James seemed determined to compel others to be so; and apparently considered persecution as a part of his religion; and surely, if there be one character more mischievous than another, it is that of a King, who, whilst he acts the tyrant, vainly imagines he pleases God, and excuses his excesses by his religion! *Nihil in speciem fallacius, quam prava religio, ubi deorum numen, prætenditur sceleribus*†. "An insuperable objection," says Addison, "to a Catholic Prince is, that he must necessarily be a tyrant. In a Popish Prince we

* 1 Vol. Torbuck's Debates, p. 70. † Tit. Liv.

have no chance for our posterity; his very piety obliges him to our destruction: and in proportion as he is more religious, he becomes more insupportable*." Such doctrines as transubstantiation and purgatory, (absurd as they seem to those who have no faith in them,) were yet, of themselves, of no great political moment, and the main objection to the Catholic religion at the Revolution, was not so much because it affected to teach a different way to Heaven, as that persecution and the unlimited power of the Sovereign has always been made one of its principal tenets. Toleration would have been allowed to the Catholics, but establishment and pre-eminence was denied to them.

The Popish attachment of Charles the Second, and of his brother James, might, perhaps, easily be traced. Their unfortunate father, subdued by love, and the strong, overpowering mind of his consort, acquired, I am inclined to think, a regard for the Popish faith, and the parents imparted it to their ill starred children; and their exile and their follies greatly tended to augment this feeling. That which the eloquent Bossuet thought matter of praise, was the fatal cause of many a royal tear. In his oration upon the death of Henrietta, the mother of Charles and of James, he exclaims, with undiscerning exultation, "*Femme et mère très chérie, et très honorée elle a réconcilié avec la France, le Roi son Mari, et le Roi son fils.*" Better had it been if Charles the First had attended to the advice of his royal father, "*to love his wife, but not her religion.*" Clarendon describes her absolute controul. "Charles," he says, "*saw with her eyes, and determined by her judgment.*†" And May, the historian, relates, that "*peace, war, religion, and par-*

* Freeholder, Number 36.

† Life of Lord Clarendon, part 3, p. 78, 79.

liament, were considered at her disposal." * James the Second too, might have profited by the same advice as was given to Charles the First, since, fatally for him and for his kingdom, his queen, the princess of Modena, was a rigid catholic. His marriage had excited much displeasure. Colonel Birch, in a speech of his in the convention parliament, observed, he asked a great man at the time, "whether he meant to perpetuate to his family a war with the house of commons."

James began his reign most inauspiciously. Without any authority he altered the coronation oath†: thus acting in the very spirit of his misguided father, who caused the coronation oath to be altered before he would take it‡; a circumstance, that very justly excited the eloquent indignation of Milton§. In Scotland, James wholly declined taking the coronation oath, because it was repugnant to the introduction of his favourite tenets‖. It was therefore true, as was asserted in the explicit vote of the *Scottish* convention, that James "acted as king, without taking the oath required by law." Not having taken the oath, it could not be said,

* May's History of the Parliament. See also a passage in Hutchinson's Memoirs, p. 70. quarto edit. "This lady, (wife of Charles the First,) being by her priests affected with the meritoriousness of advancing her own religion, whose principal it is to subvert all other, applied that way her great wit and parts, and the power her haughty spirit kept over her husband, who was enslaved in his affection only to her, though she had no more passion for him than what served to promote her designs." [Hutchinson's Memoirs, p. 70. 4to. edit.

† Tindal's continuation of Rapin. See also Atkin's Parliamentary Tracts, 413.

‡ Hutchinson's Memoirs, p. 78, quarto edit.

§ Milton's Prose Works, 3 vol. p. 308, last edit. This edition ought not, I think, to have been published without notes; for Milton's Prose Works contain many very erroneous and dangerous opinions, and are calculated to mislead the youthful reader.

‖ Laing's History of Scotland, 4 vol. p. 155.

in *Scotland*, that he had perjured himself, but having taken the oath in England, altered as it was, he afterwards disregarded it. How inconsistent, to shew so much regard to an oath, as to refuse to take it in Scotland, and to alter it in England, and yet the moment he had taken the altered oath in England, to contrive measures in complete contradiction to it!

A particular recital of the enormities committed by James, subsequent to his accession to the throne, would fully vindicate the conduct of those who proposed the bill of exclusion, and also, the magnanimous efforts of the great men, who achieved the revolution. We must contemplate with astonishment the various wanton instances of arbitrary power exercised by James, in a few years after his accession. I shall not here dilate on these enormities. Most of them, so far as respects England, are particularized in the Declaration, and also, in the Bill of Rights, and will briefly be observed upon hereafter, in the comments upon that memorable act. The history of the persecutions of the Scots, during the reigns of Charles the IId, and James the IId, is enough to curdle the reader's blood. It exhibits the barbarous triumph of intolerance. A reader of Tacitus, an historian who relates the atrocities of a remote age, is sometimes led to suspect, that he has tinged his relation with deeper shades, and darker horrors, than the truth warranted; but let such a reader peruse the historians of Scottish affairs at the period alluded to; and he will there discover enormities of a still deeper dye than those related by the Latin historian. He will find a horrid scene of torture and desolation, not proceeding from *Heathens*, but carried on by persons calling themselves *Christians*, and impiously acting, under the pretence of serving

God! as if the sighs and tears and sufferings of human creatures, were proper offerings on the altars of the God of Peace! In Ireland the same cruel intolerance was exhibited. The aggravated conduct of James having occasioned a general disgust, the momentous question now presented itself to an oppressed people, whether a king, who acted as a tyrant, might not be resisted? It had been thought, more or less, from about the reign of Henry the VIIIth, that, a divinity hedged round a king, that implicit obedience was his due, and that it was impious, on any pretence, to resist him; but these absurd notions had no countenance from common sense or common law, and had now lost much of their force. The debates, the writings, and the conversations, to which the execution of Charles the First, and the Exclusion Bill gave rise, and above all, the infamous conduct of Charles the Second, and of his brother, had greatly altered public opinion, and the divinity of kings was something more than suspected. The majority of the nation disowned this supposed divinity, and considered it as little else than a cheat, invented at first by interested divines, and afterwards used as a potent drug in the hands of ambitious, or mercenary politicians. It were, indeed, to degrade the dignity of the Almighty, to suppose that *He* protects tyrants. Good kings are eminently deserving of his particular regard, and probably receive it; but a tyrant (a title which describes an aggregate of ill qualities) must unavoidably excite his deepest displeasure. To remedy the glaring ills and breaches of trust by James, the Prince of Orange was invited into England, by an illustrious band of patriots, distinguished by their rank and

talents. The invitation was signed by 570 of the principal bishops, nobility, and gentry, and the Prince was plainly told by them, that if he would not come over, "*they would take other measures**." The bright passages in the early life of the Prince of Orange—his courage and patriotism—his religion, and his alliance with the heiress apparent to the crown†, made him, very justly, the object of the public hope. He seems indeed to have been nurtured up by Providence to strike into the dust the deadly evils of tyranny and superstition, and to purge the world of the pestilent tenets then abroad, so adverse to true religion and real liberty! To use the strong expression of a contemporary writer, "both heaven and earth pointed him out for king‡." About an age before, in the auspicious reign of Queen Elizabeth, the British nation assisted his grandfather to redeem his country from oppression; Holland now afforded that assistance to England, which, on a like occasion, had been so generously given to herself. At what time the Prince of Orange first entertained the idea of possessing the throne of England, is not easily ascertained. *D'Avaux*, the French embassador to Holland, who had superior opportunities for forming a judgment, says, in one part of his Memoirs, that the Prince of Orange laid his plan so early as the year 1679, and was even desirous of being declared Regent during the life of Charles, his uncle§: and,

* Macpherson's State Papers, vol. 1, p. 268.

† Charles the Second conferred one of the greatest blessings on his country, by uniting his niece to the Prince of Orange. The marriage was much against the wish of the Duke of York. See Temple's Memoirs.

‡ 1 Vol. State Tracts, temp. W. p. 177.

§ Negotiation of Count D'Avaux, 3 vol. p. 2. See also 1 vol. Macpherson's State Papers, p. 94.

in another part of his work, the same D'Avaux, observes, "though he had not then in view, with all its circumstances, the scheme which he afterwards put in execution, his design in general had ever been since 1680, as may be demonstrated, to take measures to make himself King of England by the exclusion of the Duke of York, and to get himself declared Regent, and to enter upon the government even during the life of Charles II. if he gave him the least cause to attempt it*." Such was the opinion of D'Avaux, and it accords, in some respects, with a very curious conversation of Temple with the Prince of Orange, the particulars of which are related in *Temple's Memoirs*.† The author of the *Caveat* against the Whigs is of opinion that when the Prince of Orange married, he was at the same time plotting the Exclusion Bill against James‡, but to what degree the Exclusionists were countenanced by the Prince of Orange, no where expressly appears. From the great anxiety which *Carstares*, a confidant of the Prince's, felt, for fear his correspondence with the Prince, at that period, should fall into the hands of James the Second§, it may, I think, be inferred, that the Prince, was by no means inactive on that great occasion. The original *Association* Paper, for which the prince long waited, and without which, he was determined not to proceed to England, formed part of the papers preserved in King William's cabinet at Kensington. It was dated the 30th June 1688, and is signed by Lord Devonshire, Lord Danby, Lord

* 4 Vol. D'Avaux, Negociations, p. 147.

† 1 Vol. Temple's Works, p. 415, 416.

‡ See *Life of Castares*, prefixed to the publication of his State Papers and Letters, p. 24, in note.

§ 2d part, p. 10.

Shrewsbury (the patron of Somers), Lord Lumley, the Bishop of London, Admiral Russell, and Mr. Sidney*. *Clari genus!*

The Prince of Orange was well warranted in placing the great value he did on the association instrument. Those who signed it, shewed in the most unequivocal terms, their entire devotion to his interests, for as against King James, the parties to it had rendered themselves liable to the penalties of high treason, and they must well know, they would be treated as patriots, or as traitors, according as their enterprise succeeded or miscarried. Never did any set of men take upon themselves a heavier responsibility. They had resolved on resistance, that last, sad refuge of an oppressed people, and this paper may be considered as its commencement. That resistance is, in certain conjunctures, justifiable, is now universally admitted. When Lord Russell on the verge of death, was solicited by some over officious divines, to acknowledge, that subjects had in no case whatever a right of resistance, he nobly and justly answered, "I can have no conception of a limited monarchy, which has not a right to defend its own limitations. My conscience will not permit me to say otherwise to the king†." As a resistance was necessarily used at the Revolution, so on the trial of Sacheverell‡, twenty years after; the right to use resistance was, in the most solemn manner, asserted in argument and was universally admitted. Sir Thomas Smith justly observes of resistance, "the vulgar judge of it according to the *event*, and the learned according to the *purpose* of them that do it." To pretend, by anticipation, to point out the occasions where resistance would be justifiable, would, to say the least, be an

* Dalrymple's Memoirs, 2 vol. p. 19. † Vid. Dalrymple's Memoirs.

‡ See the particulars of this Trial, post.

unpardonable presumption: since neither the law or our ancestor have attempted any such thing. Generally speaking, we may say, that resistance is lawful in cases of extreme necessity, and when the constitution cannot otherwise be preserved; and such necessity is plain and obvious to the sense and judgment of the whole nation. But resistance may be *lawful*, and yet not *prudent* and advisable, though Paley, it must be owned, seems to think differently*. The right and the expediency of resistance, both of them concurred at the Revolution. "Those who concerted the Revolution in England, were justifiable in their counsels, because from the apparent disposition of the nation, and the strength and character of the parties engaged, the measure was likely to be brought about with little mischief or bloodshed; whereas, it might have been a question with many friends of their country, whether the injuries then endured and threatened, would have authorised the renewal of a doubtful civil war.†" Just notions of the prudence with which the right of resistance ought always to be exercised, cannot, perhaps, be better illustrated, than by referring to the conduct and fate of "that brave, betrayed, unhappy man," as Dryden terms the Duke of Monmouth. He took up arms, professedly, in support of the religion and liberties of his country, and his cause and his pretensions were nearly equal to those of the Prince of Orange; but the one was rash and without foresight; the other as prudent as he was brave. Different too, was their fate! the one succeeded in his glorious efforts, but the other fell into the snares of the tyrant; and his imprudent and successless efforts were paid for by his life, and a sanguinary persecution of his adherents.

"Ille *crucem sceleris pretium tulit*, hic *diadema*."

* 2 Vol. Paley's Moral and Political Phil. p. 144. † Ib.

It is a just, though not a novel remark of Mr. Fox, in more than one part of his immortal work, that civil resistance in this country, even to the most illegal attacks of royal tyranny, has never been successful, without the countenance and assistance, of a proportion at least, of the higher ranks*. Certainly the higher ranks led the way at the Revolution.

The interference of a foreign Prince, (for such the Prince of Orange was,) in the internal domestic affairs of England, was, in the opinion of many, justified by a maxim, liable, certainly, to abuse; *viz.* "That a neighbouring nation may take arms to assist the rescue of a people oppressed by tyranny." Vattel has, I think, with great precision, put this matter in the proper point of view. "If," says he, "the Prince, by violating the fundamental laws, gives his subjects a legal right to resist him—if tyranny, becoming insupportable, obliges the nations to rise in their own defence—every foreign power has a right to succour an oppressed people, who implore their assistance. The English justly complained of James the Second; the nobility and the most distinguished patriots, having determined to check him in the prosecution of his schemes, which manifestly tended to overthrow the constitution, and to destroy the liberties and the religion of the people, applied for assistance to the United Provinces. The authority of the Prince of Orange had, doubtless, an influence on the deliberation of the States-General; but it did not lead them to the commission of an act of injustice: for when a people, from good reasons, take up arms against an oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties†. In the

* Fox's Historical Work, pp. 45, 231. Hume had previously made a similar observation.—Vid. 3 vol. Hume, p. 11.

† Vattel's Law of Nations, book 2, chap. 4, sec. 56.

present instance, the interference was rendered unquestionably just, by additional circumstances, not noticed by Vattel. By the interest that Prince had in the succession of the crown, and the vast majority of the nation which solicited, or at least shewed their approval of, his interference.

After King William received the Association Paper, he issued a *Declaration*, from the Hague, in which most of the principal enormities in the reign of James (except the raising of a standing army, without the consent of parliament) were enumerated; but the Declaration, in the most guarded manner, attributes the unconstitutional acts of this reign not to the King, but to his "*evil counsellors:*" and the Declaration expressly asserts, "that the expedition is intended for no other design but to have a free and lawful parliament assembled," and had no other object than "the preservation of the Protestant religion, the covering of all men from persecution of their consciences, and the securing the whole nation the free enjoyment of all their laws, rights, and liberties, under a just and legal government;" and for the accomplishment of these objects, the Declaration states, that the Prince and Princess of Orange, had been "most earnestly solicited by a great many lords, both spiritual and temporal, and by many gentlemen, and other subjects of all ranks."

The Declaration was by no means overcharged, nor could any proceeding be better calculated to conciliate the people, than that most judicious state-paper.

What share Mr. Somers had in these proceedings does not distinctly appear, but Tindal says, "he was admitted into the most secret councils of the Prince of Orange, and was one of those who concerted the measure of bringing him over."

The welfare of England, and the security of Holland, were

probably, the principal objects of the Prince of Orange; but the Declaration was silent as to the best mode of accomplishing these objects. It left all to the Convention Parliament, which was to be called. It was silent as to whether King James was to be allowed to continue to reign, or whether King William was to reign in his stead; it does not even express a wish upon the subject. All was involved in mystery.

The Duchess of Marlborough thought, at the time, that the Prince of Orange's sole design was to provide for the safety of his own country, by obliging King James to keep the laws, and that he would go back as soon as he had made us all happy; but she properly confesses, in her advanced age, that she was then a simple creature, and knew not the nature of ambition*.

Awful, indeed, must have been the period previous to, and during, the consummation of the grand design! There is a passage in one of the sermons of Sherlock, (an eye-witness of the feelings he describes) beautifully expressive of the emotions of the people in this dread hour of suspense. "Oh!" says the eloquent preacher, "that I had words to represent to the present generation the miseries which their fathers underwent; that I could describe their fears and anxieties, their restless nights and their uneasy days, when every morning threatened to usher in the last day of England's liberty, when men stood mute for want of counsel, and every eye was watching with impatience for the happy gale that should save the kingdom, whose fortunes were reduced so low, as to depend upon the chance of wind and weather†."

A strange infatuation seemed to have seized both King

* See Account of the Conduct of the Duchess of Marlborough, p. 9, &c.

† 5 Vol. Sherlock's Sermons, p. 158.

James and Louis the Fourteenth. It required perhaps only ordinary exertions to defeat, for a time at least, the daring enterprise of the Prince of Orange, but their councils seemed, as it were, to be clouded by the interference of Providence.

The two Kings, by some fatality, seem not to have been fully convinced of the designs of the Prince of Orange, till he was on the very point of executing them! otherwise, it seems, their united fleets might have overwhelmed the naval force of the Prince. If a camp had been formed by the French King, of forty or fifty thousand men, at Luxembourg, ready to march at a short warning, to Maistrich, there is reason to think, with St. Pierre, that the Dutch would never have suffered the Prince of Orange to leave the nation, and to carry eighteen thousand of their troops to England*. If King James had consented to accept of the offer of a French force, (from which, Lord Sunderland claims the merit of dissuading him†) what torrents of blood would have been spilled!

Chief Baron Atkins, who witnessed the Revolution, considered it as a *miracle*‡; and so did Sunderland§; and so did Somers‖; and another writer, who lived in those times, observes, "that if the hand of God is to be seen in human affairs, and His voice to be heard upon earth, we cannot any where, (since the ceasing of miracles,) find a clearer and more remarkable instance than is to be observed in the Revolution¶." So unexpected was the good that had arrived! and so much was the Revolution to be ascribed rather to feeling than to cold-

* Political Annals, 1 vol. p. 253.

† See Earl of Sunderland's Letter to a friend in London; published March 23, 1689, usually called his "*Apology*."

‡ Atkins's Tracts.

§ See his Apology.

‖ See Vindication, &c.

¶ 1 Vol. State Tracts, temp. William, p. 177.

blooded calculation, scarcely a town shut its gates against the Prince of Orange—not a ship or regiment declared against him! The surprise at these things, and the feelings they excited, are not ill expressed in one of the letters of Lady Rachel Russell, the relict of the great and glorious Lord Russell. "Those who have lived longest, and therefore seen the most change, can scarce believe it more than a dream; yet it is indeed real, and so amazing a reality of mercy, as ought to melt and ravish our hearts into subjection and resignation to Him who is the dispenser of all providences*."

A particular detail of the means employed to induce the Prince of Orange to accept the English crown, as well as the measures he took to ripen and mature that great event, and crown its success, belong more peculiarly to the general historian; for I do not find that Mr. Somers had any leading part assigned to him upon the occasion, though doubtless, he was much consulted by the great leaders, and particularly by Lord Shrewsbury, who led the way. A biographer, like the author of an epic poem, may be permitted, occasionally, to digress a little, but must never, for any length of time, wholly lose sight of his hero.

It is not necessary to state with particularity, the arrival of King William, and James's departure from the kingdom. What course would have been adopted if King James had remained in the kingdom, is (as I have before observed) matter only of speculation. A civil war might have been the result, for it must be remembered, that the arguments of those who favoured the Bill of Exclusion, strongly tend to shew, that nothing would satisfy the Whigs, but his utter exclusion from power;

* Lady Russell's Letters, Letter 82.

and the arguments on the word "*abdicate*," (of which more will be said hereafter) as clearly evince, that by unconstitutional conduct, he might *abdicate* his power, and, as it were, depose himself, although he did not *absent* himself from the kingdom.

The plans of the Whigs were, no doubt, all arranged previous to the arrival of the Prince; but no writer, I believe, has pretended to any knowledge of them. It is however observable, that in a monthly paper published at the Hague, in December, 1688, and supposed to be written by Burnet, the writer says, "I make no question, but in the next parliament, King James will be declared to have *forfeited his crown*;" so that whether James remained in the kingdom or not, it is probable he would have been declared to have forfeited his crown.

The flight of James, says an admirable modern historian, "was an event beyond the expectation of his enemies*," and Cunningham observes, "there was a great deal of good fortune in the King's retreat, but more of the goodness of God†." It seems, however, that the Whigs foresaw that James might be induced by his fears, and the fears of those around him, to leave the kingdom, for when the Marquis of Halifax went, very soon after the landing of the Prince of Orange, to Bishop Burnet, and asked him whether they had a mind to have the King in their hands, Burnet very readily answered, "No, by no means, for we would not hurt his person." Halifax then asked, "What if he had a mind to go away?" upon which Burnet as readily replied, "Nothing was so much

* 4 Vol. Laing's History of Scotland, p. 130.

† 1 Vol. Cunningham's History, p. 95.

to be wished for*." So that from the ready answers of Burnet, to such important questions, as well as other circumstances, it is fair to presume that the detention or hurt of the King was not designed†, and that his flight had been foreseen, canvassed, and desired.

In a late celebrated work, in allusion to the fate of Charles I. it is observed, that to suffer that King to escape, "would have been an act of justice and generosity, wholly unexampled‡." In the instance of James the Second, however, we do find such an example, though, certainly, there were peculiar circumstances in his case, and the precedent is not very likely to be followed by popular leaders, or relied on by princes. The excessive ills that excite a revolution, must always be apt to extinguish all pity for those that occasioned them.

King William was advised to detain James, till a general peace was made, or, at least, till Ireland was reduced; but this counsel he disapproved§. Such then was the fate of James. An awful lesson on the inconstancy of worldly greatness! "*Caduca nimium hac et fragilia, puerilibusque consentanea crepundiis sunt ista, quæ vires atque opes humanæ vocantur. Affluunt subito, repente dilabuntur; nullo in loco, nulla in persona stabilibus nixa radicibus consistunt: sed incertissimo statu fortunæ, huc atque illuc acta, quos sublime extulerunt, improviso recursu destitutos, profundo cladium miserabiliter immergunt*‖."

On the King's departure on the twenty-fifth, several of the

* See Burnet's History of his Own Time, 1 vol.

† Cunningham expressly says, that the Prince was against any punishment of the King. [1 Vol. Cunningham's History, p. 96.]

‡ Fox's History, p. 14, quarto edit.

§ Vid. Memorial, printed in 2 Ralph, p. 730. n. s.

‖ Val. Max. Lib. 6. De Mutat. Morum. &c. Edit. Torrenius.

lords, spiritual and temporal, assembling themselves at the House of Lords, at Westminster, proposed to the Prince of Orange, to take upon him the administration of public affairs. The Prince of Orange replied, "he would consider of the address." In the mean time, the Prince, unwilling to exercise so high an act of sovereignty as that of calling a parliament on the request of the lords, determined before he did so, to assemble such of the members of any of King Charles the Second's parliaments, as were in town, together with the aldermen and the common-council of the city of London; and they accordingly assembled, pursuant to his Highness's desire, at St. James's; to whom the Prince made a speech, importing that their advice was desired, how to pursue the ends of his Declaration, in calling of a free parliament, for the preservation of the Protestant religion, and the restoration of the rights and privileges of the kingdom, &c. His Highness desired the same of the aldermen and the common-council of the city of London, and in regard their number was likely to be great, he desired them to choose a convenient place for their consultations. Upon this, it was agreed to go to the House of Commons at Westminster, where, being met, they chose Henry Powle, Esq. chairman, and having entered into a debate, the result of it was, an unanimous vote of an address to his Highness, wherein they thanked him for the care he had taken of the religion, laws, and liberties, of the kingdom, and desired him to continue the administration of the government, and issue out his circular letters for the calling of a convention, to sit at Westminster on the twenty-second of January then following. To this his Highness replied, ("that it being a matter of weight,) he would consider of it, and give his answer the next day;" which he accordingly gave on the 28th,

to the lords that attended him at St. James's, acquainting them that he had considered their advice, and would concur with the same. This proceeding was highly constitutional, and was well calculated to enhance the popularity of King William, as it evinced so very marked a respect for public opinion. The Prince of Orange was thus, for a time, invested with uncontroulable power, and one of his first acts was to send Barrillon, the French ambassador, out of the kingdom. The army and navy very soon appeared favourable to the views of the Prince of Orange. In Ireland, where the Papists had great influence, affairs took an unpromising turn, but in Scotland the Prince's measures met with the most cordial approval. The British colonies in America, submitted, without a struggle, to the dominion of William. As Mr. Somers had not yet been a member of parliament, and was neither an alderman of the city of London, or of the common-council, he of course formed no part of the assemblage at Westminster.

Letters being issued by the Prince of Orange, the *Convention Parliament* met, on the twenty-second of January, 1689, when Mr. Somers had the honour, for the first time, of being elected to parliament, and of representing Worcester, his native city. The elections, according to Burnet and other cotemporary writers, were managed fairly, and the Prince of Orange did not interpose any recommendation, directly or indirectly. Even Mr. Hume admits (though with seeming reluctance) the meritorious conduct of the Prince of Orange on this occasion*. Thus was the nation appealed to, in the fairest manner, for its judgment at the present crisis, and a solid foundation was laid for what was to ensue. Pamphlet after

* 8 Hume, 317.

pamphlet preceded the meeting of the Convention Parliament, and various able discussions appeared, on the then state of public affairs. The attention of all Europe was turned towards the proceedings of the parliament.

Mr. Powle was nominated Speaker to the House of Commons, and Lord Halifax Prolocutor of the Peers; and as no judges were yet appointed, the House of Lords named several Advocates, of great eminence, to attend their House, and advise them on points of law*.

The Parliament having voted an address to the Prince of Orange, in which they desired the Prince to take upon him the administration of public affairs, adjourned to the 26th, and did not proceed to business till the 28th†.

During this short recess, the cabinet, the court, the houses and haunts of the several party leaders, and in general the whole town, were in the greatest agitation; every coffee-house politician had his *Utopia*, and almost every man became a legislator. Various able tracts appeared, and so very general were political discussions, that little that was new, either was or could be advanced in the Convention Parliament. In a small tract, (to which no name was prefixed) intitled, "*Short Considerations relating to the Settlement of the Government, &c.*‡" a plan was recommended, that was afterwards almost literally followed by the Convention.

At length the great day, the 28th of January, arrived! The House resolved itself into a committee of the whole House, of which Mr. Hampden was chairman, and proceeded to consider the state of the nation.

* 2 Ralph, 28, n. z. † 2 Vol. Ralph, 278.
‡ 1 Vol. State Tracts, temp. William, p. 175.

It was natural to expect a collision of opinions, but on the contrary, a wonderful unanimity appeared in the House of Commons. The first step the Convention took, was to concur in an address of thanks to the Prince of Orange. A letter sent by King James to the Lords, and others of the Privy Council, was treated with contempt.

The great object of the Whigs, seems to have been the secure attainment of their ends, by means the least grating and most acceptable to all parties. Upon this principle, Mr. Somers, who was well known to be the intimate friend and adviser of the Earl of Shrewsbury, and had so eminently distinguished himself by his writings, appears to have been the acknowledged leader in the Convention Parliament. The debates were conducted with great circumspection, and with less of passion than might have been expected*. Though the Tories maintained that kings could not be *deposed*, they did not deny that they might *abdicate*. As the Tories admitted the abdication, the Whigs thought it not necessary to determine whether a king could be *deposed*. Old Maynard expressly said, "*We do not depose him, it is his own act*;" and other Whigs said, "*it was a vain as well as a dangerous question.*" Upon the whole debate, the Whigs proposed a vote in these words, "That King James the Second, having *endeavoured*† to subvert the constitution of the kingdom, by breaking the *original contract*‡

* See Mr. Somers's Notes of these Debates, *Appendix*, No. 1.

† This word *endeavour* was very considerately used. See post, in the comment on the Bill of Rights.

‡ The existence of an *original contract* between king and people, has been much questioned. This contract must be either *express* or *implied*. Mr. Somers's disapprobation of the notion of an *express* contract, may be seen in a passage before quoted from a tract of his, [ante, p. 55.] Paley seems to have

between king and people, and having by the advice of Je-

made it the ground work of some excellent remarks. [Vid. 2 vol. Paley's Moral Philosophy, p. 138, &c.] The objections of Mr. Somers to an *express*, original contract, are equally strong when applied to an *implied* contract, and I am inclined therefore, to think, that the mention of an original contract in the vote, was more for the purpose of securing unanimity in the House of Commons, than as an expression of his real sentiments. It is very remarkable, that neither in the *Declaration* or *Bill of Rights*, is any mention made of an original contract. A contract, of which nobody knows the particulars or the limits, is capable of being employed as an engine of tyranny, or in support of liberty, just as it suits those in power. It is a nose of wax, which may be turned any way. *Hobbes* made use of it to justify tyranny; and *Rousseau* employed it to uphold his darling system of mob-government. On Sacheverell's trial, Mr. Lechmere, one of the managers, did certainly very warmly support the idea of an original contract; and *Mr. Justice Blackstone* terms those who doubted of the existence of an original contract at the time of the Revolution, "weak and scrupulous minds." [1 Vol. Blackstone's Commentaries, p. 233.] Hume, [See Hume's opinion, 1 vol. Essays, p. 404, &c.] Paley, and Bentham, [Fragment on Government, p. 45, &c.] were of this weak and scrupulous sect. Blackstone's words are, "Whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an *original contract*, they must now entirely cease, especially with regard to every prince who hath reigned since the year 1688." [1 Vol. Blackstone's Commentaries, p. 233.]

The proceedings at the Revolution did not amount to an original contract, but to something infinitely better. Part of the doctrine as to an *original contract*, was—1st, That nothing settled by the contract could be altered by the legislature, however absurd or inconvenient it might become!—and, 2dly, Every violation of the compact, on the part of the king, released the subject from his allegiance, and dissolved the government! Will this be predicated of the Bill of Rights, and the Coronation Oath? Are they unalterable? Would any violation of a single article of either, release the subject from his allegiance, and dissolve the government? God forbid! Blackstone would have been right, and it would have been consistent with his description of the power of parliament, if he had said, with the *judicious* Paley, (for he deserves that title almost as well as Hooker did,) that "*Some* IMITATION *of a social compact may have taken place at the Revolution.*" [2 Vol. Paley's Philosophy, p. 132.] As Lord Chief Justice Wilmot has observed, force and violence cleared the way for many establishments, yet intervening *compact and agreement* is the only solid basis of the right to command, which is the supreme power; and of the corresponding obligation to obey, which is the

suits* and other wicked persons violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby *vacant*." This great determination (one of the most memorable in the history of mankind) was, so far as the House of Commons was concerned, the work of only one day. Mr. Somers took a note with his pencil of the particulars of the important debate of that, and of the succeeding day, and brief as it is, it will afford more, perhaps, than any other document, the most correct view of the temper and opinion of the House of Commons†. Mr. Somers notices every speaker, except himself.

To remove the doubts of those who objected to the novelty, and temerity of excluding James from the throne, Mr. Somers, with great address, directed the attention of the house to a foreign transaction, which, to use a lawyer's phrase, was exactly in point. "Sigismund," Mr. Somers observed, "was the next heir to the crown of Sweden, and had, during the life of his father, become a convert to the Roman Catholic religion. His future subjects, like the people of England in the reign

duty of the governed. [Life of Ch. J. Wilmot, p. 218, 2d edit.] At the Revolution there was a compact or agreement between king and people, as indeed there always was from the earliest times, by means of the coronation oath; but it was not that mischievous non-entity, distinguished by the name of an *original contract*. Many writers, and in particular Mr. Burke, have adopted Blackstone's expression of an original contract, created at the Revolution, and have built upon it many very fallacious conclusions. The introduction of a contract on all occasions, by the old writers on government, was, apparently, in imitation of the civilians, and was, at one period, so familiar to English lawyers, that they carried it so far, as even to term theft, murder, rapine, &c. *involuntary contracts!*

* King James was strongly attached to the Jesuits, a most pernicious order of Catholics, as may be gathered from a perusal of their detestable tenets; see post, in the comment on the Bill of Rights.

† See Appendix, No. 1.

of Charles the Second, looked forward with dismal apprehensions to a succession, so threatening to the interests of their religion. After the death of his father their fears were in some measure removed, and their allegiance engaged by the most solemn declaration of Sigismund, that he would maintain the laws and religion of Sweden. Regardless of these, he still pursued his bigotted plans, and erected a popish church in the capital, conferred offices of the highest trust upon Roman Catholics, and put his garrisons in their hands. The alarm of his subjects now rose to the highest pitch, all ranks of men united to defend their religion and laws, and to avenge the treachery of their sovereign. Sigismund suddenly fled into Poland. An assembly of the states which met at Stockholm, not only declared that he had abdicated the crown and government, but they renounced his family and settled the crown upon his uncle, the Duke of Sudermania, and upon his heirs, who were protestants. The justice of this sentence was applauded by all the Protestant states in Europe*." This incident in modern history, was well calculated to make an extraordinary impression, and it might well be concluded from this piece of history, that foreign powers would be disposed to applaud the proposed proceedings of the Convention Parliament. The vote of the House of Commons was most judiciously framed. It was just, simple and comprehensive. There were some principles in it, which pleased all parties, except the Jacobites. It has been said, to be "*rather too guarded and too circumstantial*†;" but

* See Grey's Debates. See also Puffendorf's Introduction to his History of Europe, p. 485, where the facts mentioned by Mr. Somers are related.

† Vid. 3 vol. Burke's Works, p. 51, quarto edit.

that, perhaps, was its greatest merit. In compliance to the party, who with Sir Richard Howard and others, maintained there was an *original contract*, a reference was made to such a contract in the vote. In compliment to the Tories, who like Finch and others admitted, a King might by absenting himself, *abdicate;* and in compliance with the Whigs, who thought a king's *misconduct* amounted to an abdication, the word *abdication* was used in the vote. According to the recommendation of *Maynard* and others, the words "*advice of Jesuits*," was inserted in the vote, and at the suggestion of Sir Richard Temple and Mr. Finch, the words "*endeavour to subvert*" were introduced. Without determining betwixt these parties, as to the soundness of their doctrines; and without determining the ulterior question, as to the mode in which the crown should go or be disposed of, (an explanation which, in that stage of the proceedings, was most cautiously avoided in the House of Commons) the vote intimates, that according to the principles of the one or the other the throne was *vacant*. Thus the vote was so comprehensive, that every one found somewhat in it to approve; the conclusion drawn by it, flowed from the sentiments of all parties, except the Jacobites. Mr. Hume says, "some lawyers entangled in the subtilties and forms of their profession, could think of no expedient, but that the prince should claim the crown by right of conquest; should immediately assume the title of sovereign; and should call a parliament, which, being thus legally summoned by a king in possession, could ratify whatever had been transacted before they assembled*." Who those lawyers were, I know not.

* 8 Vol. Hume, p. 307.

Certainly, in the Convention Parliament no such argument was used by any of the lawyers; none such at least appears in Mr. Somers's note of the debates on the 28th and 29th of January. The lawyers all acted with the greatest prudence and wisdom on that occasion. At a subsequent period, Bishop Burnet and Blount urged the argument, alluded to by Hume, but it instantly met with all that discountenance, which so absurd a notion deserved*.

The vote declaring the vacancy of the throne, having passed, in the House of Commons, it was sent up to the House of Lords, for their concurrence. That house was divided into three parties. The high church, inclined to the two princesses; those we now call Whigs, who were favourable to the Prince of Orange; and a third party (much the smallest) inclined to King James. Before the Lords would determine the propriety of the word *abdicate*, and the conclusion which was drawn from it, viz. *the vacancy of the throne*, they admitted, for the sake of argument, the abdication and vacancy, and proceeded to discuss the ulterior question, whether the throne being vacant it ought to be filled by a *Regent*, or a *King*. After much argument, the question was put, when 51 voted for a King, and 49 for a Regent. On the 31st January the

* In one part of his History (Hist. Own Times, 1 vol. 745) the Bishop intimates, that the Prince of Orange was the only person that either could save the nation, or had a *right* to save it. Certainly, every man has a right to save his country, but I suppose the Bishop meant, that, as the husband of the heiress apparent, he had a right to save the nation; but was Mary in reality the next heir? was not a son interposed betwixt her and her claims? At another time, we see, Burnet insists on a *right by conquest*, and he afterwards treats the debates on the word *abdicate* with disdain; so that the good Bishop, strange to say, does not seem to have thoroughly understood the real solid principles on which the Revolution was founded.

Lords again took into consideration the vote of the Commons, and particularly that part which alludes to an *original contract* between king and people; and a question was proposed, *Whether or no there was an original contract between king and people?* It occasioned many warm debates, and upon a division, 55 voted for an original contract, and 46 to the contrary: upon this, the Lords concurred in the vote, with these amendments, viz. that, instead of the expression, *abdicated*, the word *deserted* should be used, and the last paragraph of the vote, viz. "*that the throne is thereby vacant*," should be wholly left out. The House of Commons, unwilling to adopt these amendments, sent to the Lords to desire a free conference upon the subject matter of the amendments, which was agreed to by the Lords. A committee was then appointed, of which Mr. Somers was one, to prepare and bring in Heads of Reasons to be offered at the conference with the Lords; and on the 4th February Mr. Hampden read to the House, the Reasons that had been prepared by the committee, and the House agreed to them*.

A committee of the House of Commons, to the number of 23, was then appointed to manage the conference with the Lords, and they communicated to their Lordships the Reasons of the Commons in not concurring in their amendments. Of this committee Mr. Somers was a leading member. The conference was opened by Mr. Hampden; he was seconded by Mr. Somers. It was Mr. Somers who recommended the employment of the word *abdicate*†, and of course he was anxious to maintain the propriety of its adoption. He, therefore, was

* Vid. Commons Journal, where the Reasons are stated at length.

† Vid. Grove's Life of the first Duke of Devonshire, p. 201, in note.

the chief leader "*in bello grammaticali.*" Never was any word more judiciously chosen. On the just interpretation of that one single word, the true understanding of the master principles of the Whigs, at the Revolution, essentially depends; though Mr. Hume is pleased to say that the topics on both sides were frivolous*. Mr. Somers's speech upon the occasion is of high importance: it shews in a decided manner the *principles* upon which he acted, and indeed the conference altogether is, as Rapin justly observes, "the most remarkable ever known in England, as well for the importance of the thing itself as for the ability of the managers†." Mr. Somers spoke as follows:

"My Lords, what is appointed me to speak to, is your Lordships first amendment, by which the word *abdicated*, in the Commons vote, is changed into the word *deserted;* and I am to acquaint your Lordships what some of the grounds are, that induced the Commons to insist upon the word *abdicated*, and not to agree to your Lordships amendment.

"First. The first reason your Lordships are pleased to deliver as for your changing the word is, that the word *abdicated* your Lordships do not find, is a word known to the common law of England, and therefore ought not to be used: and the next is, that the common application of the word amounts to a voluntary express act of renunciation, which (your Lordships say) is not in this case, nor what will follow from the premises. My Lords, as to the first of these reasons, if it be an objection, that the word *abdicated* hath not a known sense in the common law of England, there is the same objection against the word *deserted;* for there can be no authority, or

* 8 Hume, 314. † 12 Vol. Rapin, p. 185, octavo edit.

book of law produced, wherein any determined sense is given to the word *deserted:* so that your Lordships first reason, hath the same force against your own amendment, as it hath against the term used by the Commons. The words are both *Latin* words, and used in the best authors, and both of a known signification; their meaning is very well understood; though it be true, their meaning be not the same: the word *abdicate* doth naturally and properly signify entirely to renounce, throw off, disown, relinquish any thing or person, so as to have no further to do with it; and that whether it be done by express words, or in writing, (which is the sense your Lordships put upon it, and which is properly called resignation, or cession) *or, by doing such acts as are inconsistent with the holding or retaining of the thing; which the Commons take to be the present case, and therefore made choice of the word abdicate, as that which they thought did, above all others, most properly express that meaning;* and in this latter sense it is taken by others, and that it is the true signification of the word, I shall shew your Lordships out of the best authors.

"The first I shall mention is *Grotius de Jure Belli et Pacis,* lib. 2. c. 4. s. 4. *Venit enim hoc non ex jure civili, sed ex jure naturali, quo quisque suum potest* ABDICARE, *et ex naturali præsumptione qua voluisse, quis creditur, quod sufficienter significavit.* And then he goes on, *recusari hæreditas non tantum verbis, sed etiam re potest et quovis indicio voluntatis.*

"Another instance, which I shall mention, to shew that for the abdicating a thing, it is sufficient to do an act which is inconsistent with the retaining it, though there be nothing of an express renunciation, is out of *Calvin's Lexicon Juridicum,* where he says, *generum* ABDICAT, *qui sponsam repudiat:* He

that divorceth his wife, ABDICATES *his son-in-law.* Here is an abdication without express words; but is by doing such an act as doth sufficiently signify his purpose.

"The next author, that I shall quote, is *Brisonius, de verborum significatione,* who hath this passage, *homo liber qui seipsum vendit,* ABDICAT *se statu suo,* that is, He who sells himself, hath thereby done such an act as cannot consist with his former estate of freedom; and is therefore properly said, *se* ABDICASSE *statu suo.*

"*Budæus* in his Commentaries *ad legem secundam, de origine juris,* expounds the words in the same sense, *Abdicare se magistratu est idem quod abire penitus magistratu:* He that goes out of his office of magistracy, let it be in what manner he will, has *abdicated* the magistracy.

"And *Grotius,* in his book *De Jure Belli et Pacis,* lib.1.c.4.s.9. seems to expound the word *abdicare,* by *Manifeste habere pro derelicto:* that is, *That he who hath abdicated any thing, hath so far relinquished it that he hath no right to return to it;* and that is the sense the Commons put upon the word. It is an entire alienation of the thing; and stands in opposition to *Dicare: Dicat qui propriam aliquot facit; Abdicat qui alienat:* so says *Pralejus* in his *Lexicon Juris.* It is therefore insisted upon as the most proper word by the Commons.

"But the word *deserted,* (which is the word used in the amendment made by your Lordships,) hath not only a very doubtful signification; but in the common acceptance, both of the civil and canon law, doth signify only a bare withdrawing, a temporary quitting of a thing, and neglect only, which leaveth the party at liberty of returning to it again. *Desertum pro neglecto,* says *Spigelius,* in his *Lexicon:* but the difference between *deserere* and *derelinquere,* is expressly laid down by *Bartolus,* upon the 8th law of the 58th title of the

11th book of the Code, and his words are these: *Nota diligenter, ex hac lege, quod aliud est agrum desercre, aliud derelinquere; qui enim derelinquit, ipsum ex pœnitentia non revocat: sed qui deseret, intra biennium potest.* Whereby it appears, my Lords, that that is called desertion, which is temporary and relievable: that is called dereliction, where there is no power or right to return. So in the best Latin authors and in the civil law, *deserere exercitum*, is used to signify soldiers leaving their colours, Cod. lib. 12. s. 1. And in the canon law, to desert a benefice, signifies no more than to be non-resident: so is Calvin's Lexicon, Verb Desert. *Secund. Canones.* In both cases the party hath not only a right of returning, but is bound to return again: which, my Lords, as the Commons do not take to be the present case, so they cannot think that their Lordships do; because it is expressly said in one of your reasons given in defence of the last amendment, *that your Lordships have been and are willing to secure the nation against the return of King James;* which their Lordships would not in justice do, if you did look upon it no more than a negligent withdrawing, which leaveth a liberty to the party to return. For which reasons, my Lords, the Commons cannot agree to the first amendment, to insert the word *deserted* instead of *abdicated;* because it doth not in any sort come up to their sense of the thing: so they do apprehend it doth not reach your Lordships meaning, as it is expressed in your reasons; whereas, they look upon the word *abdicated*, to express properly what is to be inferred from that part of the vote to which your Lordships have agreed, '*That King James the Second by going about to subvert the constitution, and by breaking the original contract between king and people, and by violating the fundamental laws, and withdrawing himself out of the kingdom,*' hath thereby renounced

to be a king according to the constitution, *by avowing to govern by a despotic power unknown to the constitution, and inconsistent with it; he hath renounced to be a king according to the law, such a king as he swore to be at his coronation; such a king to whom the allegiance of an English subject is due; and hath set up another kind of dominion, which is to all intents an abdication, or abandoning of his legal title, as fully as if it had been done by express words.* And, my Lords, for these reasons, the Commons do insist upon the word *abdicated*, and cannot agree to the word *deserted**."

The policy, research, and noble principles exhibited in this speech do Mr. Somers the greatest honour. A recent historian † alluding to the word *abdicate*, observes, that "a voluntary desertion, and a virtual renunciation, both of the government and of the realm, were meant to be implied in this *ambiguous expression*, in order to open the succession to the next protestant heir. But," says he, "the abdication of government was irreconcileable with the premises, as it was neither applicable to his abuse of power, nor to his departure from the kingdom, which was certainly more from constraint than choice." Why was not the abdication applicable to James's abuse of power? The foregoing speech irresistibly proves, as it seems to me, that the *abdication* might grow out of the abuse of power, and the vote was express to shew that he had abused his power. The Whigs did not rest upon the leaving the kingdom as amounting to an abdication, and only inserted that circumstance in the vote, to please their sullen allies, the Tories.

* 2 Vol. Torbuck's Debates, pp. 191, 2, 3, 4, 5. Kennet's Hist. vol. 2.

† 4 Vol. Laing's History of Scotland, p. 204.

The second amendment of the Lords, to the vote of the House of Commons, was, to leave out the words, *and the throne is thereby vacant.* Upon this point, Mr. Somers, in a conference with the Lords, spoke as follows, in support of the original words: "My Lords, your Lordships, as a reason against the word *abdicate*, say, it is not a word known in our common law. But the word *vacant*, about which we are now disputing, cannot have that objection made to it; for we find it in our records, and even applied *in a parallel case to this of ours, in* 1 *Hen.* 4. where it is expressly made use of more than once, and there it doth import, what I think it doth import in this vote of the House of Commons, now in debate, and to require any farther or other explication of it, than the record gives, will be very hard and unreasonable; for we are here to give the Commons reasons for maintaining their own vote, and nothing else. If your Lordships please to look into the record in that case, there was first a resignation of the crown and government made and subscribed by King *Richard* the Second, and this is brought into the Parliament, and there they take notice, that the *Sedes Regalis* (those are the words) *fuit vacua*; and the resignation being read both in *Latin* and *English*, in the great hall at *Westminster*, where the Parliament was then assembled, it was accepted by the Lords and Commons. After that, it proceeds farther; and there are articles exhibited against *Richard* the Second, and upon these articles they went on to sentence *of deposition and deprivation*, and then followeth the words in the record: *Et confessim ut constabat ex præmissis et eorum occasione regnum Angliæ cum pertinentiis suis vacare.* Then *Henry* the Fourth riseth up out of his place, as *Duke of Lancaster*, where he sat before, and standing so high, that he might be well enough seen, makes

this claim to the crown. The words in the record are, *Dictum regnum Angliæ sicut præmittitur vacans una cum corona vendicat.*

"After that, the record goeth on, That upon this claim the Lords and Commons being asked, what they thought of it? They unanimously consented, and the Archbishop took him by the hand, and led him, *ad Sedem Regalem prædictam, &c.*

"Nay, and after all this, it is there taken notice of, and particularly observed, that *prius vacante sede regali*, by the lesion and deposition aforesaid, *all the public officers ceased;* there is care taken for Henry the Fourth's taking the royal oath, and granting of new commissions.

"My Lords, the Commons do therefore apprehend, that with very good reason and authority, they did in their vote declare *the throne to be vacant.* But as to the going farther to enquire into the consequences of that, or what is to be done afterwards, is not our commission, who came here only to maintain their expressions in their vote against your Lordships amendments*."

It is plain, I think, from the preceding speech, that the proceedings at the Revolution were very much fashioned after the precedent relating to Richard the Second, and Henry the Fourth. That precedent was founded on so much good sense, that it cannot be affected by the sneers of Mr. Hume. Mr. Somers sanctions the Revolution at that period, and if the proceedings at that time are duly considered, they will serve, in a very great degree, to illustrate the *principles* upon which the Whigs founded themselves at the Revolution of 1688.

* Vid. 2 vol. Torbuck's Parliamentary Debates, pp. 232, 3, 4; and Kennet's History, 3 vol. p. 511.

The duties of the sovereign, and the rights of parliament, were most explicitly asserted in the reign of Richard the Second. In the 11th Richard II. the parliament represented to the King—"That they find it an *ancient statute*, and it has been done in fact not long ago, that if the king, through any evil counsel, or foolish contumacy, or out of scorn, or some singular petulant will of his own, or by any other irregular means, shall alienate himself from his people, and shall refuse to be governed and guided by the laws of the realm, and the statutes and laudable ordinances thereof, together with the wholesome advice of the lords and great men of his realm, but persisting headstrong in his own hare-brained councils, shall petulantly prosecute his own humour, that then it shall be lawful for them, with the common assent and consent of the people of the realm, to *depose* that same king from his regal throne, *and to set up some other of the royal blood* in his room*."

The debates on the occasion of these most memorable conferences are voluminous. For details I must refer to others. My care only is to record what *Somers did* and *wrote*, and *said*. Suffice it to say, that the nation agreed with Mr. Somers and the House of Commons, and at length, on the 6th of February, the majority of the Lords departed from their two amendments, and expressed their agreement with the Commons respecting the use of the word *abdicate*, and the phrase "*vacancy of the throne*." The House of Lords must therefore be supposed to have concurred in the arguments used by Mr. Somers, and others, on the conferences. A most important concession!

* Vid. Speech delivered from the parliament by the Lord Thomas de Woodstock, Duke of Gloucester, and Thomas de Arundell, Bishop of Ely, to King Richard the Second, in the 11th year of his reign, on his absenting himself from his parliament. Third collection of Somers Tracts, vol. 1, p. 1.

The important vote of the Commons having been thus agreed to by the Lords, the next question debated by them was, "Whether the Prince and Princess of Orange should be declared King and Queen?" and it was resolved in the affirmative, by sixty-five votes against forty. In the next session, the Lords, in the *Bill of Rights*, explained this most important resolution; and, in effect, the exclusive sovereignty was bestowed on their deliverer. These votes were sent to the Commons, and, with some amendments, were agreed to. During the conferences, and in all the debates at that time, it is plain that the Whigs were extremely guarded in their language. There was at that period, a party of Tories, that were utterly averse from Whig principles in their full extent. There was also a party of Republicans, who factiously piqued themselves on the right of electing kings, when, and on what terms, they chose, and seemed altogether to renounce the idea of hereditary succession. It was necessary, therefore, not to insist too much upon the right of election. The Whig managers seemed studiously to avoid enlargement upon it. Such, indeed, was the wise precaution with which they chose to proceed, (for wise it was, considering their situation,) that we must couple their *acts* with their *words*, before we can derive correct notions of the principles upon which they proceeded.

By the acts of the Convention, it is clear, that it considered the monarchy of this kingdom, in the then emergency, as elective. It shewed its *right to elect*, by abandoning King James, and his unoffending child, and by giving the Prince of Orange, in reality, the sovereignty of the kingdom, but it shewed its veneration of a lineal descent, and its complaisance for the prejudices of the Tories, by making the Queen, nominally, conjoint sovereign. It was a prudent compromise, be-

tween party and party! It was a coalition of principles! The Tory and the Republican, and those between the extremes, found all of them in this arrangement, as well as in the celebrated vote of the Commons, (which was framed according to the same policy,) something to gratify their honest prejudices, but nothing to encourage or foment their errors.

It is to the conciliatory conduct of the Whigs that we must attribute any indirectness that may be discovered in the language or the actions of the Whigs. It had been better and nobler, if it had been practicable, to have declared, as the Convention in Scotland did, in express terms, that James the Second had *forfeited*, or as they expressed it, *forfaulted* the right of the crown; but the English nation was not then ready to receive this bold truth. The Tories in the House of Commons would not have assented to such a vote, and it is probable, the Lords House, influenced as it was, would not have concurred. In England, the Revolution was brought about by a coalition of Whigs and Tories, for the Whigs alone could not have succeeded; but in Scotland, the Whigs almost alone brought about the Revolution*; and this, and not the vehement temper of the Scots, accounts for the directness of their resolutions. It is plain, I think, that the Whigs in England and in Scotland held the same sentiments, and the difference of their language was wholly attributable to a difference of situation. There are persons who treat with some degree of contempt, many of the arguments of the English Whigs; but to do them justice, we must place ourselves in their situation—we must remember the immediate necessity there was of settling the government—the conflict of parties—the varieties

* 2 Vol. Dalrymple, p. 300 and 311.

in public opinion—and the difficulty of reconciling such heterogeneous principles. They were desirous of accomplishing their ends in a manner satisfactory to the Tories, and yet not so as to compromise their principles. If this most difficult situation is considered, it will account for the Whigs being unwilling to avow in more express terms, those rights which they were determined to exercise; it will account for the recourse they had, in the debates upon the vote, to language that has been too tartly and inconsiderately censured, by several admired writers. *Millar*, for instance, calls them "*childish evasions* and *fictious suppositions;*" "*feigned* and *ridiculous pretences**." *Mrs. Macaulay*, terms them "*ridiculous refinements*†;" and Sommerville denominates them, "*verbal quibbles*," "*obscure, trifling*," and "*incomprehensible distinctions*‡:" but those who view the conduct of the Whigs in the light I have endeavoured to place it, will not readily join in these censures, and will rather conclude with Ralph, "that these *words* (abdicate and deserted) floated only on the surface of the dispute, and there was something more at the bottom §." The situation of the Whigs, when duly considered, will explain, why what has been called "the absurd pretext" of an abdication, was employed to cover the real deposition of the sovereign. In this point of view, the disputes about the words *abdicate* or *desert*, and about the vacancy of the throne, must be considered. In any other light indeed, we might justly conclude, with Burnet, Bolingbroke‖, Macpherson¶, and Hume**, in allusion to the dis-

* Vid. 3 vol. Millar's Hist. View, p. 446. octavo edit.

† 8 Vol. Mrs. Macaulay's History, p. 328. See also what *Dalrymple* says, 1 vol. Memoirs, p. 268.

‡ Sommerville's History of King William, p. 230.

§ 2 Ralph, 49. ‖ Dissertation on Parties, p. 107.

¶ Macpherson's History, 1 vol. p. 565. ** Hume, 8 vol. p. 314.

cussions on the word *abdicate*, that such nice and critical disputes were fitter for a school than a house of parliament.

The indirectness of the English Whigs at the Revolution was necessary at that time, but its consequences were lamentable. What disputes, what bloodshed, what rebellions followed, and all of them, in some degree occasioned by unsettled principles, or as I should say, principles considered as unsettled. A happier specimen, however, of political management, was never yet, and never will again, perhaps, be presented for the happiness and admiration of mankind. And here we may observe, how much depends in all Revolutions, upon the wisdom, authority and prudence of the leaders in them. How difficult is it for men to be cool and dispassionately wise, amidst the stings of regal oppression, the cry of an indignant people, and the zeal of conflicting parties! But this moderation Mr. Somers and his party maintained, to the infinite advantage of their country, and their own eternal honour; nothing violent appears in any of their measures. The two important votes having passed, and also a vote settling the oath of allegiance and supremacy, the House of Commons began to think of the necessary limitations to the authority of their future King. A Committee had been appointed, of which Mr. Somers was a principal member, to bring in general heads of such things as were "*absolutely necessary to be considered, for the better securing our religion, laws and liberties**." Sir George Treby presented the Report of this Committee to the House on the 7th of February. By order of the Committee it was afterwards divided into two branches; one, *declaratory* of ancient rights, and one, *introductory of new laws*. This Report he read

* Vid. 10 vol. Journals of the House of Commons, p. 15.

in his place, and afterwards delivered it at the clerk's table, where being once read throughout, and each article a second time, one by one, the same, after some amendments made, were, upon the question, severally put and agreed to. They are well worthy of attention*.

* The Report affords a very distinct idea of the political principles of the House at that period, and of Mr. Somers and the Committee in particular, and their notion of the ills which then required remedy. This Report is very little noticed by the historians. Those subjects of the Report which are marked in Italics, were afterwards introduced into the *Declaration* and *Bill* of Rights.

1. *The pretended power of dispensing or suspending of Laws, or the execution of laws by regal prerogative, without consent of parliament, is illegal.*

2. *The commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.*

3. *Levying money for or to the use of the crown by pretence of prerogative, without grant of parliament for longer time, or in other manner than the same shall be so granted, is illegal.*

4. *It is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning are illegal.*

5. The acts concerning the militia are grievous to the subject.

6. *The raising or keeping a standing army within this kingdom in time of peace, unless it be with the consent of parliament, is against law.*

7. *It is necessary for the public safety, that the subjects, which are protestants, should provide and keep arms for their common defence, and that the arms which have been seized and taken from them be restored.*

8. *The right and freedom of electing members of the House of Commons;* and the rights and privileges of parliament, and members, as well in the intervals of parliament as during their sitting, to be preserved.

9. *That parliament ought to sit frequently,* and that their frequent sitting be secured.

10. No interrupting of any session of parliament, till the affairs that are necessary to be dispatched at that time are determined.

11. That the too long continuance of the same parliament be prevented.

12. No pardon to be pleadable to an impeachment in parliament.

13. Cities, universities and towns corporate, and boroughs and plantations

Some have supposed that the part of this Report which was introductive of new laws, was distasteful to King William,

to be secured against Quo Warranto's and Surrenders and Mandates, and restored to their ancient rights.

14. None of the Royal Family to marry a Papist.

15. Every King and Queen of this realm, at the time of their entering into the exercise of their royal authority, to take an oath for maintaining the Protestant religion, and the laws and liberties of the nation, and that the Coronation Oath be revived.

16. Effectual provision to be made for the liberty of Protestants in the exercise of their religion, and for uniting all Protestants in the matter of public worship as far as may be.

17. Constructions upon the Statutes of Treason, and trials and proceedings and writs of error, in cases of treason, to be regulated.

18. Judges commissions to be made *Quamdiu se bone gesserint;* and their salaries to be ascertained, and established, to be paid out of the public revenue only, and not to be removed nor suspended from the execution of their office, but by due course of law.

19. *The requiring excessive bail of persons committed in criminal cases, and imposing excessive fines and illegal punishments to be prevented.*

20. Abuses in the appointing of sheriffs, and in the execution of their office, to be reformed.

21. *Jurors to be duly impannelled and returned,* and corrupt and false verdicts prevented.

22. Information in the Court of King's Bench to be taken away.

23. The Chancery and other Courts of Justice, and the fees of office to be regulated.

24. That the buying and selling of offices may be effectually provided against.

25. That upon return of Habeas Corpus's and Mandamus's, the subject may have liberty to traverse such return.

26. *That all grants of fines and forfeitures are illegal and void;* and that all such persons as procure them be liable to punishment.

27. That the abuses and oppressions in levying and collecting the Hearth Money be effectually redressed.

28. That the abuses and oppressions in levying and collecting the Excise be effectually redressed.

and that he sent a message to some leading members of the Committee, importing, that if the Houses insisted so much on limitations, he would return again and leave them to the mercy of King James*. This seems extremely improbable; it was not conformable to the other parts of his conduct. Certain it is, however, that on the day after the Report was presented, (the 8th,) so much was said to shew the necessity of expediting the settlement, and so many members appeared to be of opinion, that expedition was of the utmost consequence, that it was resolved, when the vote of the Lords, declaring the Prince and Princess of Orange King and Queen, was brought to the House of Commons, on the 8th of February, that all such heads as were *introductory of new laws*, should be omitted, and that only the *declaratory* part of the Report should be connected with the instrument of government.

The method of connecting all these particulars with the Lords vote, was by amendments, and it is remarkable, that the drawing up of those amendments, was referred to a *new committee*, of which *Mr. Somers* was chosen chairman; and so expeditiously did they perform their commission, that the Report of the amendments was made by Mr. Somers, and agreed to on the same day; and immediately thereupon both the vote and amendments were delivered, by Mr. Somers at a conference, to the Lords, and the House adjourned. These amendments were on the 11th taken into consideration by the Lords, and they were sent down to the Commons with other amendments, to the number of twenty, all of which, except six, were adopted. At length, the *Declaration of Rights*, thus

* See "Great Britain's Just Complaint," and "Short History of the Convention," in the Somers Tracts.

modelled, was assented to by each House; and the Declaration was, by an order of both Houses, directed to be engrossed and remain among the Records of Parliament, and also enrolled in Chancery, to remain to perpetuity.

The *Declaration* of Rights, is recited in the *Bill* of Rights, which passed in the second session of the first parliament of King William; I shall therefore, to avoid repetition, anticipate the order of events, and in the ensuing chapter offer some comments on the Revolution, and the *Bill of Rights*. It seems to me, that I cannot in any more effectual manner, do justice to the principles and character of Lord Somers.

END OF THE FOURTH BOOK.

CONTENTS OF BOOK V.

Fundamental Principles on which Revolution founded—Bill of Rights, with a Comment.

BOOK V.

Never before was so important a Revolution accomplished without bloodshed, or confined within reasonable bounds. Had it been the triumph of the religion and cause of a popish over a protestant prince, instead of being the reverse, what scenes of desolation would have ensued! The people of England were contending for their religion and their liberties, and they did not, by any sanguinary excesses, dishonour the holy cause in which they were engaged. Never was their native firmness, and good heartedness, rendered more apparent. That which Wentworth, Elliot, Pym, Hampden, Hollis, Selden, Sidney, and Russel had sought, and in the pursuit of which, some of them died, was now happily secured —a limitation of regal authority—the reign of law—and the superintending control of parliaments.

The great blessing of this Revolution consists, in the principles it illustrated, and the security it introduced; and as Mr. Somers led the way, and has so well explained himself in his writings, it is not unimportant to consider, what those

fundamental principles were, which were then so solemnly recognized.

1st. It was held, that the king is a *trustee* of power, for the benefit of his people.

2dly. That if he grossly abuses his trust, he may be *resisted**.

It was a saying of those ancient Jurists, *Bracton* and *Fleta*, "*Rex habet superiorem, deum, s. item legem, per quam factus est rex. Item curiam suam, videlicit comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fræno. i. sine lege, debent ei frænum ponere*†." Upon this text, the Revolution was a comment. As the groundwork of the Revolution, it appears to have been admitted, that government is not a *property*, but a *trust*. The absurd doctrine of divine indefeasible hereditary right and of non-resistance (a constant incentive to tyranny) were once more successfully assailed. We have already seen some forcible observations of Mr. Somers, on this subject; and in another work, very generally attributed to Lord Somers, and of which more will be said hereafter, he has made some excellent remarks on the same topic. "All that do assert unconditional obedience, do assert, that kings derive their authority from God alone. I deny that there ever was any

* I use the term *resisted* rather than *deposed*, which though often used by great writers, is capable of a mischievous interpretation. *Resistance* necessarily implies misconduct in the sovereign, but *deposal* does not, and when it is said a king may be deposed, it may be, and indeed it has been contended, that he may be deposed, *although no breach of trust is imputable to him*. English history affords no warrant for such a doctrine.

† Bracton, lib. 2, c. 16. See also to the same effect, lib. 1, c. 5. And Fleta, lib. 1, c. 17, uses similar language.

king in the world that derived his authority from God alone*." This proposition he maintains with great research and ability. He further forcibly insists, "The doctrine of absolute passive obedience is inconsistent with the goodness of God, and the love he hath for man; and is destructive of the end, intent and design of God's laws, which is man's happiness. For God, who is infinitely happy in himself, had no other motive than the happiness of man in those rules he has given them to walk by; and for that reason has made it a duty in him to help the poor and miserable, relieve the oppressed and distressed, and do all manner of kindness and good offices to one another. Can it then be presumed that he requires obedience to tyrannical power, which brings poverty, misery and desolation on a nation? If it be a duty to relieve the poor, it must be a duty to hinder people from falling into that miserable condition, which they cannot prevent, except they have a right to oppose arbitrary power. And if it be a duty to promote the public good, which they cannot do if they are obliged to submit to tyrannical government, it must be their duty to oppose it. There is no duty that a man owes to his neighbour, or himself, but does oblige him to oppose tyrannical government, in doing thereof he gives that honour, and performs the duty which he owes to his Maker, which cannot more be shewn than in imitating Him, by promoting the good and happiness of his fellow creatures. The preaching or promoting of passive obedience without reserve, is a much greater crime than the encouraging of rebellion; because a civil war, though very sharp, cannot continue long,

* Judgment of Whole Kingdoms, sect. 44. This work is referred to in Junius's Letters, as a work of Lord Somers, and is denominated an "*excellent tract.*" See Letter 21.

and a nation may flourish and be happy again. But if once arbitrary government be introduced upon the principles of passive obedience, people's miseries are endless; there is no prospect or hopes of redress. Every age will add new oppressions, and new burthens to a people already exhausted. If he, by God's command, was to be cursed that removed his neighbour's landmark, what curses may they deserve that make it their business to preach or promote absolute passive obedience, which removes all the bounds, fences, and securities that whole nations have, not only for their lands, but their liberties and lives, and prostrates them at the feet of a single person. Our first reformers, and the generality of popish and protestant writers, were totally unacquainted with this doctrine, which can never relish well with free-born subjects; nor has it any other use than to encourage kings to be tyrants, and to render them odious, and their people miserable. And what sad and fatal consequences always attend tyranny, and the dreadful effects of arbitrary power, all ages can attest*." It is therefore an undoubted and fundamental principle of the English constitution, and acknowledged at the Revolution, that the powers and prerogatives of the crown are vested there as a *trust* for the benefit of the people; and to use the words of a Prince, "they are sacred only as they are necessary to the preservation of the poise and balance of the constitution, which experience has proved to be the true security of the liberty of the subject†."

* Judgments of Whole Kingdoms, sec. 115 and 116.

† See Letter from the Prince of Wales to Mr. Pitt, relative to the intended Regency in 1789, Annual Register, 31 vol. p. 301. See also Burke's *Thoughts on the present Discontents*, 1 vol. Burke's Works, p. 463, quarto edition.

In another part of the same work, Lord Somers is very express on this topic. "The power that is lodged in the king is only a *trust*, and nothing more; for no prince has any other right to the throne, than what the laws of the land, or voice of the people gives him; for he cannot have a right by nature; he has no more power or authority from God, before he is a magistrate, than another man; all men are ordained of God, and have power or strength from him, either to do good or evil, and God Almighty permits them to do either. The prince has his authority from the people, or the law, which chooses or appoints him to be supreme, of which he is only executor, during the intervals of parliament. The law is the rule and power of his government, (and the measures of the people's submission and obedience) beyond which he hath no just or rightful power in his politic capacity*."

When once it was thoroughly admitted, that government was a *trust*, and that this trust was not derived from God, but from the people (as *Somers*, *Fortescue*†, and others so truly assert) it was natural to conclude, that like all other trusts, it was capable of abuse, and that when outrageously and grossly abused, the people for whose happiness the trust was created might, through their representatives, interfere to remedy the abuse. "*If*," says Vattel, whose opinion Mr. Burke quotes and adopts, "*the body of the nation*" (by which I suppose he means both Houses of Parliament) "declares the king deprived of his rights *by the abuse he has made of them, and depose him*, they may justly do it when its grievances are well founded, and no other power has a

* Judgment of Whole Kingdoms, sec. 18.

† See Fortescue de Laudibus, &c.

right to censure it*." This language was sanctioned by Grotius†, and the same sentiment is enforced by Lord Somers, in the tract of his before alluded to.

"As Great Britain has been the most provident and careful of all countries of reserving to itself, upon the first institution of and submission to regal government, all such rights, privileges, liberties, as were necessary to render it either renowned and honourable abroad, or safe, happy, and prosperous at home; so it hath, with a courage and magnanimity peculiar unto it, maintained its privilege and liberties through a long series of ages, and either reassured and secured them by new and super-added laws, when there were endeavours to undermine and supplant them, or else have vindicated them with a generous courage, even to the deposition and abdication of treacherous, usurping, and tyrannical princes, when more gentle, mild, and senatorian methods were found weak and ineffectual to cover and protect them to themselves, and to convey and transmit them to such as were to come after. The people of Britain have the same title to, and security for the enjoyment of their liberties and properties that our kings have to their crown, or for the defence of the regal dignity. For as they can plead nothing for what they enjoy as kings, but fundamental and positive laws; so the subject's interest in his liberty and property is conveyed unto him by the same terms and channels, and fenced about with the same hedges and

* See "*Remarks on the Policy of the Allies*," in Appendix, 4 vol. Burke's Works, p. 163, quarto edition. This was not a sentiment approved when Mr. Burke was a young man, but was advisedly adopted by him, in his advanced age, and after he had retired from public life, and had amply partaken of the bounty of the Crown. It affords an answer to many untenable remarks in his "*Reflections*," &c.

† De Jure Belli et Pacis, lib. 1, ch. 4, s. 13.

pales *. This doctrine he enforces in his usual manner, with great learning and ability.

"'Tis plain," says Lord Somers, in another part of this work, "from what hath been said, that all government authority and magistracy proceeds from the people. Now I will shew that they have authority to set aside the next heir to government, when unfit or uncapable to govern; and also to dispossess them that are in possession, if they observe not the laws and conditions by which and for which their dignities were given them; and when it is done upon just and urgent causes, and public authority of the whole body, the justice thereof is plain: as when the prince shall endeavour to establish idolatry, or any religion which is repugnant to the scripture, contrary to the laws of the land, or to destroy the people, or make them slaves to his tyrannical will and pleasure †." He then gives examples of the exercise of this principle in various states and kingdoms.

On the subject of *resistance*, Mr. Somers observes, "If the subject may in no case resist, then there can be no law, but the will and pleasure of the prince; for whoever must be opposed in nothing, may do every thing; then all our laws signify no more than so many cyphers; and what are all our law-makers, but so many fools and madmen, who give themselves trouble to no purpose? for if the king is not obliged to govern by those laws that they

* Judgment of Whole Kingdoms, section 6. Very similar to the above opinion of Lord Somers is what is said by Baron Fray, in the Year Book of Henry VI. "*Le parlem̄t est la court du Roy, & le plus haūt court q̄ il ad, & la ley est le plus haūt inheritance q̄ l Roy ad: car par la ley il mēm & touts ses subjects sont rules, & si s̄ ley ne fuit, nul Roy, ny nul' inheritance sēr.*"

[Year Book, De Termino Paschæ, Anno xix H. VI. Case I.]

† Judgment of Whole Kingdoms, &c. section 83.

make, to what purpose are the people to obey such laws*." He has given an answer to one of the strongest objections against resistance. "If a government, say some, may be disturbed for any unlawful proceedings of the governor, or his ministers, how can any government be safe?—To which I answer, that it is not lawful for a few persons to oppose their prince, and it is impossible for one, or a few oppressed men to disturb the government much, where the body of the people do not think themselves concerned in it, and that the consequences seem not to threaten all; yea, when it does, yet in matters of lesser moment, the people are not very forward to disturb the government; as in King Charles the Second's time, when the charters were condemned and seized upon, in order to make us slaves, and the laws perverted, to the loss of many innocent lives, and the gaols filled with dissenters, for worshipping God according to their consciences, and many other oppressions, too many to insert; and yet they did not send for a foreign power, nor rise against the government, nor preach sedition, though their persecution was much greater than against the church in King James's reign. *I say, till the mischief be grown general, and the designs of the rulers become notorious, then, and then only, will the people be for righting themselves*†."

Swift observes, in regard to resistance, "It is a point I shall not presume to determine; and therefore shall only say, that to any man who holds the negative, I would demand the

* Judgment of Whole Kingdoms. This opinion of Lord Somers is in conformity with that of a very great modern judge, Sir Michael Foster. See Foster's Crown Law, p. 382, 3. octavo edition. See also some just remarks by Addison on Resistance, in No. 5 of the *Whig Examiner*, and the very admirable reflections of Hume, in 1 vol. Hume's Essays, pp. 427, 8.

† Judgment of Whole Kingdoms, &c. section 185.

liberty of putting the case as strongly as I please. I will suppose a prince limited by laws like ours, yet running into a thousand caprices of cruelty, like Nero or Caligula; I will suppose him to murder his mother, or his wife; to commit incest, to ravish matrons, to blow up the senate, and burn his metropolis; openly to renounce God and Christ, and worship the devil; these, and the like exorbitances, are in the power of a single person to commit, without the advice of a ministry, or the assistance of an army. *And if such a king as I have described cannot be deposed but by his own consent in parliament, I do not well see how he can be resisted, or what can be meant by a limited monarchy*; or what signifies the people's consent in making and repealing laws, if the person who administers has no tie but conscience, and is answerable to none but God. I desire no stronger proof that an opinion must be false, than to find very great absurdities annexed to it; and there cannot be greater than in the present case; for it is not a bare speculation that kings run into such enormities as are above mentioned; the practice may be proved by examples, not only drawn from the first Cæsars, or late emperors, but many modern princes of Europe; such as Peter the Cruel, Philip the Second of Spain, John Basilovits of Muscovy, and, in our own nation, King John, Richard the Third, and Henry the Eighth. But there cannot be equal absurdities supposed in maintaining the contrary opinion; because it is certain that princes have it in their power to keep a majority on their side, by any tolerable administration, till provoked by continual oppression; no man, indeed, can then answer where the madness of the people will then stop *."

* Vid. "The Sentiments of a Church-of-England Man," 3 vol. Nichols's edit. Swift's Works, pp. 376, 377.

This reasoning appears extremely just; but Swift was not rich enough, or had too much ambition, or had not fortitude sufficient to persist in it. His new patrons, the Tories, required another tone; and he accordingly soon after, with great effrontery, turns his back on his former reasoning, and in another tract observes, "That the legislature should have power to change the succession whenever the necessities of the kingdom require, is so very useful towards preserving our religion and liberty, that I know not how to recant. The worst of this opinion is, that at first sight it appears Whiggish; but the distinction is thus: the Whigs are for changing the succession whenever they think fit, although the entire legislature do not consent; I think it ought never to be done but upon great necessity, and that with the sanction of *the whole legislature**." By the expression, "whole legislature," he must mean (in opposition to his former opinion) King, Lords, and Commons; and therefore, according to this reasoning, a delinquent king must be, as it were, *felo de se*, and himself concur in a legislative act, *to depose and resist himself!* How differently Lord Somers thought on this subject is apparent from the passages already quoted.

The act of the 6th Anne, ch. 7, has before been adverted to†, and I shall here only observe, that that act, though it vindicates the power of the King, Lords, and Commons, to limit the succession, yet it does not say, that the two Houses have no power, in great emergencies, amounting to a vacancy, to elect a king. Mr. Somers, who framed that part of the bill, could never have had such a meaning. It would have been to question the au-

* Vid. "Some Remarks on the Barrier Treaty," 3 vol. Swift's Works, p. 423. Nichols's edition.

† *Ante*, p. 59.

thority of the Convention Parliament. On the solemn impeachment of Sacheverell, in 1712, the doctrine of unlimited non-resistance was in full parliament, and after long debate, given up and disclaimed, (as before observed,) so that the right of resistance, as practised at the Revolution, is as fully established by law, as any law ever was or can be. Well might Sir Joseph Jekyll exultingly exclaim, on the Impeachment before alluded to, " May it not, in after-ages, be an addition to the glories of this bright reign, that so many of those who are honoured with being in her Majesty's service, have been at your Lordships bar, *thus successfully contending* for *the national rights of her people, and proving they are not precarious or remediless* *?"

Blackstone seems to look at the *precedent* illustrated by the Revolution, rather than the *principle* of the great proceeding at that period, and views it more with the eye of a case-bound lawyer, than of an enlightened statesman. He seems to think, that the same conjunction of circumstances is necessary to justify a similar proceedure†. If the nation were bound to refrain from resistance, until circumstances occurred precisely the same as those which led to resistance at the Revolution, it would refrain for ever. Fortunately, the poison and the antidote lodge within a few pages of each other; for Blackstone, in a neighbouring passage, says, " If a vacancy, by any means whatever, should happen, the right of disposing of this vacancy seems naturally to result to the Lords and Commons, the trustees and representatives of the nation‡." A vacancy, according to the clear opinion of the two Houses at the Revolution, may arise from gross breaches of trust. If, then, the

* Sacheverell's Trial.

† 1 Vol. Blackstone's Comm. p. 245. ‡ Ib. p. 213.

Houses of Commons and of Lords, on grounds satisfactory to themselves, vote that the throne is vacant, they may proceed to supply the vacancy, and the same conjunction of circumstances, as occurred at the Revolution, would not be necessary to justify such a vote on the part of the two Houses. The like necessity will justify the like remedy.

A king may abdicate his crown by gross breaches of trust, and another may be elected in his stead, as at the Revolution; but a question may arise, whether a delinquent king ought to be *punished?*—I think it was the clear opinion of the Whigs, at the Revolution, that he ought not. Not a wish of the kind appears to have been expressed by any one, except a few violent republicans, and they were not encouraged. Gibbon has said, that a king is *responsible* to the people for his administration; but this is not constitutional language *. It is irreconcileable with strict notions of justice, that a king should be punishable, any farther than a deprivation of power may operate as a punishment; and for this plain reason, because, in the nature of things, he *never can have a fair trial.* He never can have, what the meanest of his subjects has a right to insist upon, an impartial trial, by a jury of his equals. Instead of this, his accusers must be his judges. Milton, in a framed tract of his, intitled, "*The Tenure of Kings and Magistrates,*" &c. uses much argument and learning in support of the lawfulness of tyrannicide; but since his time, the most enlightened politicians seem to have disapproved this harsh doctrine of that pure but stern republican †. If, however, a king has, by maladministration, abdicated his crown, and the two Houses de-

* I quite agree with Mr. Burke in his objection to *responsibility* in the sovereign. 33 vol. Burke's Works, p. 54.

† The right to punish tyrannous Kings, is strongly insisted upon, in Moreton's famous speech, in Buchannan's Hist. Scot. lib. 20.

clare that the throne is vacant, then it seems that he must be considered, from that time, as having altogether lost his kingly character, and from that period becomes, like any other subject, liable to be tried and punished for any offence committed by him after that time. Sir Edward Coke *, and Sir Michael Foster †, appear, in effect, to lay down this doctrine, and *Grotius*, expressly says, "If a king, or any other prince, abdicates his government, (*imperium abdicavit*,) or manifestly abandons it, *after that time* we may do the same to him as to any private man." This doctrine provides at once for the justice due to kings, as well as for the safety of the nation.

Gibbon seems, at one period of his life, to have dwelt with some complacency on the account of the crimes and punishment of *Mezentius*, as fabled in Virgil ‡; and whilst he penned his observations on the subject, the fate of James the Second must, unavoidably, have occurred to his recollection §;

* 3 Inst. 7. † Crown Law, 380. ‡ Virgil. Æneid, viii.

§ The curious passage alluded to in Gibbon, is as follows:—"*Every reader, while he detests the crimes of Mezentius, must applaud the exertions of a free and generous people, who have ventured to dethrone their tyrant, and are eager to punish him.* I have always wondered," says he, "that the courtier of Augustus should have introduced an episode which would have been more properly treated by the friend of Brutus. Every line breathes republican sentiments, the boldest, and perhaps the most extravagant. Mezentius was the lawful and hereditary sovereign of a country of which he rendered himself the tyrant. His subjects hurled him from the throne, and thenceforth regard themselves as free, without once considering the rights of his unfortunate and virtuous son. Mezentius finds an asylum amongst the Rutuli; but his furious subjects implore the assistance of their allies. All Etruria in arms determine to tear their king from the hands of his defenders, in order to subject him to punishment; and this fury of the Tuscans is approved by the Gods and the Poet:

"Ergo omnis furiis surrexit Etruria justis,
Regem ad supplicium præsenti Marte reposcunt."

[Virgil. Æneid, viii. 494. Vid. 2 vol. Gibbon's Miscellaneous Works, 315.]

but they were the sentiments of his youth, nor would he perhaps, in his advanced age, have quoted with so much rapture his two lines from Virgil. It is, however, some excuse, that Grotius had long before cited and approved them; and it is worth observing, that even Mr. Burke, in his great anti-revolution work, has, with a Roman mind, exclaimed that, "the punishment of real tyrants is a noble and awful act of justice, and has with truth been said to be consolatory to the human mind*."

It has been complained of, by many writers, that more was not accomplished at the Revolution, and that the *Declaration*, and *Bill* of Rights, ought to have been more comprehensive and remedial, and should have contained farther provisions in behalf of the liberties of the people. This, it was urged, was a second revolution, in the same age, unimproved by parliament; the one, as ineffectual in the hands of Patriots, Whigs, and Dissenters, as the other was in the hands of Cavaliers and Churchmen. The feudal poison, it has been said, was so little exterminated at the Revolution, that, to use the words of the Poet, "*they scotched the snake, not killed it.*" Many writers have reiterated these complaints, but they seem not to have paid a due regard to the situation of affairs at that period. Insuperable obstacles stood in the way of the Whigs. A recent writer has supposed, that at the period of the Revolution, "there was full leisure for deliberation;" and that "the situation of the expectants of the crown enabled the eminent men of that time to make such stipulations as they thought necessary for the security and happiness of the people.

* "*Reflections on the Revolution in France*," 1st octavo edit. p. 123. Whether Mr. Burke means the punishment occasioned by a deprivation of his throne, or a still more awful punishment, is not quite clear.

In such a state of things," says he, " the wisdom, the experience, the talents, the political courage, and the virtue of Lord Somers alone, would have been almost sufficient to have ensured the success of the measures*." But this author is greatly mistaken. The Prince of Orange, on his first meeting of the Convention Parliament, told them, " that next to the danger of unseasonable divisions amongst themselves, *nothing could be so fatal as too great delay in their consultations*†, and this he repeated on the next day‡. In a speech of *Serjeant Maynard* on the memorable 28th January, 1688,9, in the Convention Parliament, he says, " Let us not delay to set the government in motion under whatever fair pretence, lest we give occasion to moles, who work under ground, to destroy the foundations you laid yesterday. This is my fear, dictated by the knowledge and experience of past times, and this, as a true Englishman, who love my country better than my life. The things mentioned are obvious, in your present situation easy to be attained. But it is essential and of immediate necessity there should be a king. The law has so bound the king (whether you declare it anew or not) that he can do wrong, unless wicked counsellors advise to break it; but in this there can be no mistake for ignorance. *You are without power, without justice, without mercy, other things require time and admit of it.*"

Mr. Polexfen too, was urgent to the same effect. " Whatsoever things you would do, will not require consideration here, but must be agreed by Lords as well as Commons. The proposition, excellent in itself, but if it have the effect to con-

* Rose's Observations on Fox's Historical Work, p. 19.

† Vid. Commons Journal for 22d January, 1688,9. ‡ 23d January.

found us, a dreadful proposition—am as willing as any to apply redress to grievances—but to delay supplying the government will restore the king." It is clear therefore I think, that in the Convention Parliament there was not *time* to discuss proposed improvements. Besides, supposing there had been time, and a disposition to improve, is it quite clear that without a king, the Convention Parliament could enact binding laws? The government, it must be admitted, was not broken up and subverted, but only *endeavoured* to be subverted. The people were not in a situation to frame every thing anew. It is very clear that the Convention Parliament might declare the abdication of one king, and might elect another, and all this was done; but could it go farther? Did not its authority begin and end with *the necessity of the case?* "I will not," says a celebrated writer, "say that the two Houses have ever gone so far as to *make law*, although I believe they have gone so far as to *make a king**."

At the Restoration, Mr. (afterwards Sir) Matthew Hale and others, wished to restore Charles the Second *upon conditions;* for he was not for making a surrender of all, and receiving back the King, without any restrictions; on the contrary, he thought that was an opportunity that ought not to be lost, for limiting the prerogative, and cutting off some useless branches which served only as instruments of oppression†. For this purpose, he moved, that a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered, by Charles the First‡, during the war, and

* Letter concerning Libels and Warrants, p. 75, written by Mr. Dunning, afterwards Lord Ashburton.

† Vid. Emlyn's Preface to Hale's Pleas of the Crown.

‡ 1 Vol. Burnet's Own Times, p. 88.

particularly at the treaty of Newport; and from thence to digest such propositions as they should think fit, to be sent over to the king; but Mr. Hale does not seem to have thought that the Convention, without the King, could legislate. His ingenious design was, that these intended concessions should be drawn up in the form of a *new coronation oath**, to be taken when the King arrived.

Monk strongly opposed the motion of Mr. Hale, by urging the danger of delay, and that they might as well prepare and offer the conditions when the King should come over, and the House, with shouts, approved his opinion. Mr. Hume, it is observable, does not, in reference to these proceedings, question the power of the Convention to make limitations, but says, "they would have been *superfluous*," and for this strange reason, "because they might be *extorted* at a future period†!"

The vote as to the vacancy of the throne, by the two Houses, and their joint vote, that the Prince and Princess of Orange should be King and Queen, together with their acceptance of the sovereignty, formed together complete acts, and such as required no additional confirmation. These acts, the two Houses were, *ex necessitate*, capable of performing. Several bills passed before the Bill of Rights passed, and therefore that bill was not considered necessary

* See Ludlow's Memoirs. I am fully aware of the various able arguments used at the time of the proposed Regency in 1789, and the Regency which took place in 1811, and have (with all due deference to better judgments) formed my opinion of the discussions at those periods, as well as on most of the great political questions of the present day; but I have anxiously avoided any allusion to them, and have contented myself, in this work, with an endeavour to exhibit and illustrate the opinions of our Whig ancestors, on those measures in which Mr. Somers was concerned.

† Hume's History, 7 vol. p. 355.

to complete the title of the Prince and Princess of Orange to the throne, and indeed, the bill expressly says, that their Majesties "*by accepting the crown, as mentioned in the declaration of rights, did become King and Queen.*" If they did not, the Bill of Rights could not mend the matter, nor would they have been more king and queen by that act, than before. But it was different as to that part of the declaration of rights which related to the limitation of the crown, and the rights and liberties of the subject, for this declaration, so far as regards such limitation, and such rights and liberties, had not, *ex necessitate*, the strength and effect of a positive or *a declaratory law*. The passing of the Bill of Rights and the language of the act, fully warrants this construction. It declares that by the *abdication*, and by their Majesties *acceptance* of the crown, they *became* King and Queen. The act then proceeds to limit the crown, and after reciting the Declaration of Rights, the Bill of Rights proceeds to say, "for ratifying, confirming and establishing the said Declaration, and the articles, clauses, matters, and things therein contained, *by the force of a law made in due form by authority of parliament*, do pray, &c." As the King and the Lords alone cannot make law, so neither can the two Houses alone make law. Before the Bill of Rights passed, the Prince and Princess of Orange were King and Queen to all intents and purposes; they could not only assent to Acts of Parliament, as they did, but treason, I apprehend, might have been committed against them; but the limitation of the crown was not effectual, and as to the *Declaration* of Rights and Liberties of the subject, if it could have been clearly shown, in any case, that occurred, that the law was different from what it was there declared to be, the Judge would have been bound to disregard the Declaration of Rights, and decide

according to the law; but after the *Bill* of Rights passed, whatever the law was before, inasmuch as that Bill declares, what the law is, the Judges would have been bound to consider that act as law in every point there declared to be law; for an act of parliament mows down all that opposes it, and rules uncontrolled. In this manner it was, that the managers of the Revolution steered clear of the Act of the 13th of Charles II. s. 1. c. 1*. They only claimed or exercised a *legislative power, pro tanto,* and such a power as the Statute of Charles *could* not take away, and did not *intend* to take away. They claimed and exercised a right to declare the abdication of one king, and to elect another, but they did not pretend to limit the crown, or make laws, that should exclusively affect the subject, and thus far, *from the necessity of the case,* they were obliged to go, and might therefore legally go. But then it may be said, supposing there were legal objections to the Convention Parliament making new laws, yet when the throne was filled and the Bill of Rights was about to pass, why was not that Bill made, not merely declaratory of ancient rights, but also introductive of new rights; since no legal difficulty could then occur, inasmuch as the throne was full. The truth was, the Whigs found it, at that period, impossible. In all the improvements in the constitution that were afterwards introduced, what struggles did it occasion, and what a load of prejudices, was it necessary to clear away? *Tindal* hints, that more might have been effected at the Revolution, and *Smollet* is very vehement as to what ought to have been done at that period†, and he states the im-

* The heads only of this important Statute are given in Ruffhead's edition of the Statutes, and the Statute is marked by him as expired, though some of its provisions are still in force. The Statute is inserted at length, in Mr. Raithby's late edition of the Statutes.

† See Continuation of Hume.

provements he desired; but almost all his proposed improvements are of a very doubtful hue, and if established in their full extent, would have effected a total change in the English constitution. *Mrs. Macauley* too, is loud in her complaints, because the Whigs were not prepared to go all her republican lengths.

If all the grievances before stated* had been remedied, it had been well; some of them were afterwards redressed, but to redress them all at once would be found impracticable at any season, and was more especially impracticable by the parliament, that passed the Bill of Rights.

When, in a subsequent year, 1700, the Act of Settlement was brought forward, another opportunity was afforded for amending the constitution, and accordingly, Mr. Harley, (afterwards Earl of Oxford) moved that some conditions of government might be settled as preliminaries before they should proceed to the nomination of the person, that their security might be complete. Yet how little was done at this auspicious moment! Were the supposed omissions in the Bill of Rights supplied? By no means, a plain proof that alterations of established laws, are not so feasible, as some closet speculators have supposed.

Blackstone† observes, that "the proceedings at the Revolution, *owing to the peculiar circumstances of things and persons*, were not altogether so perfect, as might have been wished." This is the proper light in which to view the matter, for certainly no blame is attributable to the patriots of that day; they did all it was in their power to do. Every Revolution must be in a great degree imperfect! Some few speculative philosophers may agree upon the political evils which require remedy, and may concur in certain

* *Ante*, p. 227, 8. † 1 Vol. Commentaries, 212.

proposed remedies; but where will you meet with a deliberative assembly, so numerous and so composed as the Convention Parliament was, that will unanimously concur in opinion as to the ills of their country, and the propriety of the remedies proposed. If they concur in a sense of their grievances, will they agree as to the proper remedies? Such an assembly may, without much difficulty, be brought to concur, as it did at the time of the Revolution, in acknowledging, that certain well-known laws have been violated, and that the royal trust has been broken, but when called upon to deliberate, not upon broken laws, but upon evils requiring new remedies, a wide field of deliberation is opened, and boundless discussions ensue. If we do but consider, how much discussion the most reasonable proposals for new laws occasion, even at the present day, in parliament, we shall cease to wonder that more was not effected at the Revolution, and that our ancestors at that period contented themselves with only asserting our ancient indubitable rights. Amidst the contest of parties at the Revolution, and when prejudices and passions of all kinds were on tip-toe, it may safely be pronounced, that it was utterly impossible to do more for the people, than was then done; to have attempted more, would have hazarded the accomplishment of the Revolution.

The Convention Parliament had elected William and Mary, and this election required no additional confirmation, but the limitation of the crown, and the declaration of the people's rights and liberties by the two Houses, did not amount to a law, and therefore it was necessary, by act of parliament, to limit the crown, and declare the law, and thus give the limitation and declaration the effect of law. All this was done by the Bill of Rights.

It has been said, however, that the laws passed at the Revolution, were the acts of party heat and violence, and to be regarded accordingly. In the same strain, Lord Mansfield, more than once, contended, that the ancient constitution of this country was as absolute as France and Spain, and that the limitations upon the power and authority of the Crown recognized at the Revolution, were not, as the Bill of Rights asserts, a vindication and assertion "*of the true ancient and indubitable rights and liberties of the people,*" or as the Act of Settlement (12 and 13 William, ch. 2,) terms it, a restoration of the subjects *to the full and free possession and enjoyment of their religion, rights, and liberties,*" but innovations on the ancient constitution, in favour of the people*. If then, it were true, as Sir John Davis, Salmasius, and others of their tribe, contend, that neither the King's act, nor any act of parliament can give away his prerogative, and that the common law makes void all such acts, in what a miserable plight would the people of England be! Mr. Hume, it seems, was of Lord Mansfield's opinion, as may fairly be deduced from the general tenor of his celebrated history. A recent historian has also fallen, as it seems to me, into a strange mistake, by

* See his speech, 3d June, 1782, 8 vol. Debret's Parliamentary Register, p. 334,5. His words were these, "In the early days of our existence, the government was solely in the hands of the crown; this being as absolute a monarchy as France, or any other in Europe. The Crown could make war, force the subjects to support that war, and, in fine, oppress them in an infinite variety of ways, for every purpose that the will or caprice of the monarch prompted. The people had no share in the government, the king had no control, the power rested solely with him. At the Revolution, the constitution was better, and more wisely settled. The government was then divided between the three estates, the power of the crown was lessened, and the people had an essential part lodged with them. The Crown was still allowed to hold the executive part of the government, *but having lost its prerogative, was lowered down so as almost to become merely nominal.*"

observing, " that it is a fact which needs neither disguise nor palliation, that the Revolution, abstractedly considered, was an unquestionable violation of the law*." This also may confidently be denied, and it may, I think, be demonstrated, that the Revolution was a proceeding altogether according to solemn precedents, and an exercise of rights, always possessed.

In truth, it was hardly proper to call it a Revolution, and the Whig managers on Sacheverell's trial, declared, that it would be a libel on the Revolution, to say, that any innovation on the constitution, had taken place at that period. The Bill of Rights was, as Blackstone says," *only declaratory of the old constitutional law*†." It was no new plan. "*If*," says Sir Joseph Jekyll on Sacheverell's trial, " *the doctor instructed his council to insinuate, that there was any innovation in the constitution wrought by the Revolution, it is an addition to his crime; the Revolution did not introduce any innovation, it was the restoration of the ancient fundamental constitution of the kingdom, and giving it its proper force and energy*‡. Another modern writer, who has used so much research to establish the rights of the crown, and is ranked, by his enemies, amongst the high flying Tories, does very fairly admit, that the Bill of Rights, was " a new security to old rights, except in the circumstance of a protestant king§." And in another part of his tract‖, he says, " The settlement then made, was justified by the occasion, being in defence of our ancient rights, religion, and liberties." Mr. Burke's opinion on the proceedings at the Revolution in 1688, is well known by every reader, and is lamented by

* 1 Vol. Belsham's History, p. 66, quarto edition.

† 4 Vol. Commentaries, p. 378.

‡ Sacheverell's Trial, p. 264, folio edit.

§ Vid. Reeves's Second Letter to the People of England, pp. 66, 152.

‖ Ib. p. 160.

every admirer of truth. On that point he deceived himself, and, possibly, deceived others. A remark of Hume might be justly applied to Mr. Burke, and on many occasions, to himself. "Men of the greatest genius, where they relinquish by principle the use of their reason, are only enabled by their vigour of mind to work themselves the deeper into error and absurdity*."

I have therefore in explanation, and vindication of the Bill of Rights, (that memorable work of Mr. Somers,) and as the best mode of illustrating his principles, given the Bill at full length, together with some few explanatory comments on that important law; and I am persuaded, that the more familiar we become with English history, and the more we seek into ancient records concerning it, the more inclined we shall be to conclude, that *though the administration of government has occasionally been despotic, yet according to law, it has always been a free and limited constitution.*

In the tried advantages flowing from these rights, their best title to our approval consists; but our regard ought to be greatly enhanced, when it is shewed, they have been immemorial, since it would be shameful indeed, if with such example, and such experience to animate us, we should suffer thus our brightest inheritance from our ancestors, to be torn or inveigled from us, and not "*wrestle and tug*" for our liberties as they did.

That the principles of the Revolution are not yet generally understood, may be seen in other recent and admired writers. *Dr. Sommerville* for instance, in his History of the Revolution, has altogether misconceived the principles upon which it proceeded. This is the

* 7 Hume's History, 383.

more to be lamented, because, generally speaking, his reasonings are liberal and just. According to him, the profession of the catholic religion by King James, devolved the crown upon the Princess of Orange, and by Her and her sister, the Princess Anne, declining the succession, and consenting to devolve the right upon the Prince of Orange, he became entitled to the crown, and the convention did no more than confirm this transfer*.

Strange reasoning! how opposite to the language of the Declaration and Bill of Rights! Before the Bill of Rights, a catholic might, by law, succeed to the throne, but supposing he could not, and that the next protestant heir was entitled, yet that heir could not, by his consent only, legally transfer the crown to a stranger. What mention of James's religious profession, or of the consent of his daughters, is noticed in the Declaration or Bill of Rights? The Declaration and Bill of Rights teach a very different doctrine. They teach us that by the conduct of the king, the throne was vacant, and that in consequence no person had a right to the throne, but that by the vacancy it became elective, and was at the disposal of a Convention. Indeed, Sommerville himself, falls into inconsistencies, and in another part of his work, in allusion to the rights defined and declared at the Revolution, he observes, "A more propitious opportunity for accomplishing this great design never could occur, than at a time *when the crown was to be transferred as a free gift*, and

* Vid. Sommerville's History of King William, p. 239, &c. The reader will not be so surprised, as Mr. Rose seems to have been, [see Rose's Observations on Fox's Works, Introduction, p. 13,] that Mr. Fox should have classed Sommerville, with other Prerogative Writers, [Vid. Pref. to Fox's Historical Work, p. 20.]

when the person who was to receive it was a professed friend to liberty, and the protestant religion." In one part of his work, therefore, he considers the crown as the *right* of King William, and in another, and certainly a more correct passage, he considers it as a *free gift* to him; the repugnancy of which is apparent; for it will hardly be contended, that a person can have a right to a free gift. Blackstone has said, alluding to the Revolution, "I rather choose to consider this great political measure upon the solid footing of *authority*, than to reason in its favour from its *justice*, *moderation*, and *expediency*, because that might imply a right of dissenting or revolting from it, in case we should think to have been unjust, oppressive or inexpedient*." It is thus that the maxims of the forum are, by this writer, endeavoured to be transferred to the legislature; he would bind our legislators in the trammels of our judges. If the Revolution was not founded in justice, in moderation and expediency, its foundations are rotten, and it deserves execration. As authority,

* I Vol. Commentaries, p. 212. I have freely criticised some passages in Blackstone's great work, but there are few authors, I think, to whom more admiration is due. It is true he was inclined, on legal subjects, to think, that "whatever is, is right," but this was far better than to think in the other extreme, as some of his captious adversaries seem to have done, that "whatever is, is wrong." *Est modus in rebus.* In a recent Life of Blackstone, [See Aikin's Biography, tit. Blackstone,] he is accused of "*narrowness of mind*," and his tract relative to copyholders, is adduced as a proof of this, but, as I think, unfortunately; for in that tract, he was as a lawyer, stating what he conceived to be the *law* on the subject, and expressly disavows considering the subject as a statesman, and with a view to what ought to be the law. Blackstone's words are, "It must be remembered, that we are not to inquire at present, what *would be* the best and most equitable constitution for this purpose, according to the modern state of property in this country; but what *really is*, and long has been, our legal constitution on this point. [Considerations on the Question, &c. p. 5.]

it is nothing, if it was but a piece of injustice; unless it was founded in justice, it deserves no admiration, nor ought it ever to be imitated, or considered as authority. Precedents ought to be as nothing in the eyes of parliament, if they run counter to the genius of the constitution. "*Nihil novi fiat contra exempla atque instituti majorum,*" is a good maxim for *Westminster Hall*, but is a bad one for *St. Stephen's Chapel.* The true rule for the latter, may be found in Cicero: "*Semper ad novos casus temporum novorum consilliorum rationes accommodasse;*" but when Lord Mansfield used this same argument in a court of law, as he did, and almost in the same words*, the sentiment was not suited to the place. Discretion in a judge would render the subject insecure in all his most valuable rights, and liberties. "The discretion of a judge," says Lord Camden, "is the discretion of tyrants; it is always unknown, it is different in different men, it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice, in the worst it is every vice, folly and passion to which human nature is liable."

That the Revolution was according to law, that it was just and moderate, and expedient, and therefore, that it is an authority, and a precedent, to all future times, will be demonstrated, as I hope, in the following Comment on that ever memorable Bill, The Bill of Rights.

* See Corbet and Poelnitz, 1 T. R. p. 8. See the Speeches of Cæsar and of Cato, in Sallust; the one in favour of precedents, and the other against being restrained by them. See also what Bishop Burnet urged to King William, to induce him to take the revenue for a limited period, 2 vol. Burnet's History O. T. p. 43.

BILL OF RIGHTS.

1 Wm. and M. Sess. 2, c. 2.

An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.

"*Whereas the Lords Spiritual and Temporal, and Commons,* "*assembled at Westminster,* LAWFULLY, *fully and freely repre-* "*senting* ALL THE ESTATES OF THE PEOPLE OF THIS REALM, "*did upon the thirteenth day of February, in the year of our* "*Lord one thousand six hundred and eighty-eight, present unto* "*their Majesties, then called and known by the names and style* "*of* WILLIAM AND MARY, *Prince and Princess of* ORANGE, "*being present in their proper persons, a certain declaration* "*in writing, made by the said Lords and Commons, in the words* "*following, viz.*"

COMMENT.

"*Lawfully, &c.*"—The *legality* of the *Convention,* is here asserted. In another part of the Bill of Rights, *a full and free representation,* is again asserted, but the word *lawful* is not used.

It was not to be expected, that at an era like the Revolution, a very strict attention would be paid to *forms,* but it did so happen, that every step taken, was conformable to law. A great modern judge has said, in a case of *prize law,* "The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases is likewise legal*." What is thus said, in a matter of prize, holds good in political exigencies, but there is no want of this doctrine, to justify the proceedings at the Revolution. Generally speaking, it is true, that "none can begin, continue, or dissolve the parliament, but by the king's authority†." But if, by any means, during the sitting or adjourn-

* Robinson's Admiralty Reports, 3d vol. p. 266. † Co. Litt. 110. a.

ment of parliament, the king *abdicates* his throne, or becomes incapable of exercising his great trust, the two houses of parliament may supply the deficiency; and if there is no parliament in existence, when the king so abdicates his throne, or becomes incapable of exercising the trusts attached to it, the House of Lords, it seems, is to be considered as the hereditary great Council, and Counsellors of the nation, and may, and ought, to issue writs for the assemblage of a Convention Parliament, to supply the deficiency in the kingly office*. *Prynne* expressly says, The nobility of the kingdom are " the hereditary great council and counsellors of the nation, in all actual interregnums and public confusions (as our historians, records, law books, and the Commons themselves, in the Long Parliament, resolved) both by custom, law, and right†." *Prynne*, did not mean, I apprehend, that the House of Lords, on such occasions, had a legal right to assume all the functions of royalty, but that they had a legal right to assume royalty so far, as that if parliament was not assembled, to order writs to be issued, to assemble the same, so that the Lords, together with the House of Commons, might supply the deficiency in the regal part of the constitution.

The measures at the Revolution were, however, founded on a still broader basis. The House of Lords did not act alone, but all the members who had sitten in the House of Commons, during any parliament of Charles the Second, (the only parliament whose election was regarded as free) were invited to meet, together with the mayor, aldermen, and common council, and all these concurred with the Lords, in requesting, that the Prince of Orange would order letters to issue for the election of a Convention Parliament. Had the Lords ordered letters, or writs to be issued, in the first instance, it would, I apprehend, have produced a legal parliament, and perhaps the Prince of Orange ought only to be considered as their agent on this great occasion, and as acting on their behalf.

* See what Lord Nottingham said on this subject, in the free conference in 1688, when the debate as to the vacancy of the throne took place.

† " *A short legal, &c. Prescription, &c.*" first printed in 1659, and reprinted in 8 vol. Harleian Miscellany, p. 81, edit. 1748.

The Convention Parliament that restored Charles the Second, was built on a much more doubtful foundation, for the writs for elections were issued, not by the Lords, but by the few remaining members of the Long Parliament.

"*Representing all the Estates of the People,*" *&c.*—From these words, it does not appear, whether upon this occasion the Lords were considered as the trustees, and representatives of their country, equally with the members of the House of Commons, or whether they were considered only as representing themselves.

In 1701, 2, *the House of Commons resolved,* "That to assert the House of Commons, is not the only representative of the Commons of England, (alluding to a work intitled, *Jura Populi Anglicani,*) tends to the subversion of the rights and privileges of the House of Commons, and the fundamental constitution of the government of this kingdom*."

Mr. Burke seemed to think, that the House of Commons is the sole representative of the people†; and so *Milton* had thought, long before‡. *Lord Shelburne,* (afterwards Marquis of Lansdowne), contended, that the House of Lords, is, equally with the Commons, the representatives of the people§. In the celebrated case of *Ashby and White*‖, *Lord Chief Justice Holt* expressly says, that the representatives of the Commons of England, chosen by and out of themselves, have the whole right of all the Commons of England vested in them, and represent all the Commons of England. And that great antiquary and lawyer, *Prynne,* thus expresses himself, "Our peers in parliament, (though they there serve for the good of the whole kingdom, which hath always trusted to them, in matters of counsel, judicature, and making laws), *yet they represent no person but themselves only, or their families, tenants, friends, and allies, which depend upon them,* and bear their own expences.". . . . "Wherefore," says Prynne,

* Vid. Journals of the House of Commons; and see 2 Ralph, p. 1015.

† 2 Vol. Burke's Works, 626, and see 4 vol. Burke's Works, p. 544.

‡ 3 Vol. Milton's Prose Works, p. 267, 276, last edition.

§ Debret's Parliamentary Register of Lords Debates, 10 vol. p. 392.

‖ 2 Raymond's Reports, p. 950.

"there is no shadow of reason, why the people should elect them, since they do not represent them, nor pay them wages, as they do their knights, citizens, and burgesses, who serve for and represent them*."

Mr. (*afterwards Chief Justice*) *Vaughan*, in his famous argument relative to the impeachment of Lord Clarendon, expressly said, in the House of Commons, "*that the Lords only represent their own persons*†." There is a curious anecdote, mentioned in *D'Ewes*, which shews, that this opinion was not new. When the Commons first desired to deliberate apart from the King, and the House of Lords, "a bold and worthy knight, at the time when this was sought, (the king desiring a reason of their request, and why they should separate from their betters), answered shortly, that his Majesty and the Nobles, being every one a great person, *represented but themselves;* but his Commons, though they were but inferior men, yet every one of them represented a thousand men‡." *Mr. Burke* says, "In legal construction, the sense of the people of England is to be collected from the House of Commons. If there is a doubt whether the House of Commons represents perfectly the whole Commons of Great Britain, (I think there is none,) there can be no question, but that the Lords and Commons together represent the sense of the whole people to the crown and to the world§."

Mr. Somers, by the language he uses in the Bill of Rights, viz. "*all the Estates of the People of this Realm,*" does not determine a question which has often been mooted, viz. Whether a parliament consists of three estates of the realm, including the King as one of those estates, the Lords and Clergy another, and the Commons a third estate; or whether parliament is composed of the King, *and* the three estates of the realm; thereby supposing the Nobility to form one estate, the Clergy another, and the Commons the third. Great names are at

* Prynne's Plea for the Lords, and House of Peers, p. 141, printed in 1658.

† Vide Proceedings in the House of Commons, about impeaching Clarendon, MS. p. 69.

‡ D'Ewes's Journal.

§ Letter on a Regicide Peace, 4 vol. Burke's Works, p. 544, quarto edition.

variance on this "very embroiled affair," as Warburton terms it. The enemies of the hierarchy contended, that the Spiritual Lords did not form *an Estate*, nor were an essential part of the legislature; and the republicans hoped to diminish the authority of the sovereign, when they contended that the King was an estate; for their fatal corollary was, that as a co-ordinate power, he might be over-ruled by the other two*.

Sir Arnold Savage, who was *Speaker* of the House of Commons in the time of Henry the Fourth, shews, by an irreligious allusion, what his opinion was upon the subject. He compared the three estates of the realm to the Trinity, as consisting of King, Lords Spiritual and Temporal, and the Commons; wherein, he adds, ought to be unity†.

It was also asserted, by the *Lord Chancellor*, in the *8th Edward IVth*, according to the record, as follows, "He then declared, (in the presence of the King, Lords, and Commons) the three estates to comprehend the governance of this land, the pre-eminence whereof was the King, as chief, the second to the Lords and Bishops, and the third to the Commons‡."

Bishop Aylmer, who lived in the time of *Queen Elizabeth*, writes to the same effect. "The regiment of England is not a mere monarchy, as some for lack of consideration think, nor a mere oligarchy, nor democracy, but a mixed rule of all these. Wherein each one of these have, or should have, like authority. The image whereof, and not the image but the thing indeed, is to be seen in the Parliament House, wherein you shall find, *these three estates, the King or Queen which representeth the monarchy, the Noblemen which be the aristocracy, and the Burgesses and Knights the democracy*§."

Mr. Just. Doderidge, in his "*English Lawyer*," p. 137, expressly entitles the King one of the three estates. *Sir Robert Sawyer*, in his speech in the Convention Parliament, asserted also that the King forms

* Vid. Dr. Hunton's Work, on Mixed Monarchy. See also the Decree of University of Oxford in 1683.

† Parliamentary History, 2d vol. p. 65.

‡ See Sir Robert Cotton's Abrid. of the Records, p. 682.

§ See 1 vol. Bio. Brit. by Kippis, p. 393, note F.

one of the three estates*. *Lord Hardwicke* seems to have held the same doctrine, "No new law," says he, "can be introduced here, but is the work, and has the consent of the three estates of the realm†." Now, if the King did not form one of the three estates, the proposition would not be true, for the law would not then be the work of the three estates, but of the King, *and* the three estates. Indeed, in another report of the case of *Middleton and Croft*, *Lord Hardwicke* is expressly reported to have said, "No law can be made to bind the people of the land, unless their own consent be first obtained by the joint concurrence of *the three estates, King, Lords and Commons*‡."

Dr. Hurd (afterwards Bishop of Worcester,) seems to have considered the King as one of the three estates, and in one of his dialogues, introduces *Mr. Somers*, and makes him speak to that effect§. *Charles Yorke*, expressly terms the King, one of the three estates‖, and so does the author who wrote under the name of *Junius*, in more than one of his letters¶.

It is observable also, that the framers of the petition for a reform in parliament, presented by Mr. (now Earl) Grey, which petition is said to have been drawn by Mr. Tierney, and was approved by a multitude of great men, uses the same language. And to the same effect was the resolution of the Irish House of Commons, at the period of the intended Regency in 1788, viz. "That parliament had discharged an indispensable duty, *in providing for the third estate* of the Irish constitution (rendered incomplete through the King's incapacity) by appointing the Prince of Wales, Regent of Ireland."

On the other hand, Lord Coke in his *4th Inst. p.* 1, a work of his old age, says, "The Court of Parliament consisteth of the King's Majesty, as sitting there in his royal politic capacity, *and* of the three estates of the realm."

* Vid. Appendix, No. I.

† See Middleton and Croft, 2 Str. Rep. 1056.

‡ Cases temp. Hardwicke, published by Ridgeway, p. 114.

§ Hurd's Dial. 2 vol. 315. ‖ See Yorke on Forfeitures, p. 109.

¶ See Junius's Letters, Letter 17 and 60.

In the parliament that elected Henry the IVth. to be king, and deposed Richard the IId. the Lords and Commons repeatedly declared themselves on that memorable occasion, to be all the estates of the realm*.

Sir Thomas Smith in his "*Common Wealth of England,*" p. 13. expresses himself in the same manner as *Sir Edward Coke. Hakewell* also in his tract, on "*The Customs of England,*" says, "The three estates consist of the Nobility, Clergy, and Community." *Sir Walter Raleigh* has also, on various occasions, expressed the same doctrine.†

In the statute of the 1*st of Elizabeth*, c. 3. s. 2. (an act of great import, it being a recognition of Elizabeth's title to the crown,) there are these words, "For which causes we your said most loving, faithful, and obedient servants, representing the three estates of your realm of England."

In Cotton's Abridgment of the Records, abundant proofs may be found that parliament consists of the King *and* the three estates‡. *Lord Clarendon* was decidedly of opinion, that the King did not form one of the three estates, and set his face against a most important state paper, merely because it contained a contrary doctrine, which he considered, as extremely injurious to the church§. *Sir Matthew Hale*

* See a copy of the original records on this occasion, printed by *Sir Robert Twisden*, at the end of his edition of the *Decem Scriptores Historiæ Anglicanæ*, p. 2743. Twisden's name does not appear in the title page of this valuable work, and in the copy of the work to which I have had recourse, there is the following memorandum, "*Collated and perfected by me, J. Woodman.*" See also *Sir Robert Cotton*, or as it should be called, *Bowyer*'s Abridgment of the Records, p. 384; and *Parliamentary History*, 2 vol. p. 4, &c. See also this transaction as related by *Walsingham*. See also the expression in the statute, 1 Richard III. Rot. Parl.

† See *Remains*, p. 219, 237, 330.

‡ Vid. Prynne's Table of Contents, tit. Parliament, and the various instances there referred to.

§ See 1 vol. *Life of Clarendon*, p. 130; and see ib. p. 101, 2, and Clarendon's History, book 4. See also the introduction to *Dr. Nalson's Impartial Collection*,

too, held the same doctrine*. What this great antiquary says, seems conclusive on the subject. "The Nobility, Clergy, and Commonality, are the three estates of the kingdom. The King comes in upon a higher denomination and title; namely, the head of these three estates. And therefore they, that have gone about to make the King one of the three estates, are mistaken, as will easily appear to any, that will but read the records fully, being, viz. *Rot. Parl.* 9 *H.* 5. *n.* 15. the conclusion of the peace between the kings of England and France, by the King's command in parliament, *2d May*, 9 *H.* 5. read *coram tribus statibus regni, viz. prælatis et clero, nobilibus et magnatibus, et communitate regni Angliæ*, and by them assented unto. *Rot. Parl.* 3 *and* 4 *E.* 4. *n.* 23, *le Roy* ET *les trois estates. Rot. Parl.* 13 *E.* 4. *n.* 16 *and* 17, *Domino rege* ET *tribus statibus regni stantibus in eodem parliamento.*" And in the first parliament of the usurper, R. III. who would be sure to want no formality to countenance his usurpation, *Rot. Parl. n.* 1. *titulis regius*, there is recited an instrument allowing him to be king, before his coronation was declared in the name of the three estates of this realm of England, viz. the Lords Spiritual and Temporal and Commons. "Bee it ordained," that, "the tenour of the sayd rolle, with all the contynue of the same, presented as is abovesaid, and delivered to our beforesaid Souverain Lord the King, in the name and on the behalf of the sayd thre eestates, out of parliament, now by the same three estates assembled in this present parlement, and by auctorite of the same, bee ratifyed, enrolled, recorded, &c." This, though done in a time of usurpation, yet sufficiently evidenceth what the three estates were. And the objections against it, 1. That two of those three estates are constituents of the Lords House, and so must out-balance the Commons, which are but one of the three estates; and 2. That the Lords Spiritual by this means, should have a negative voice upon the Lords Temporal and

&c. pp. 14, 15, where he maintains that the King does not form one of the three estates, and corrects a mistake of *Rushworth's*.

* See Hale's Jurisdiction of the Lords House of Parliament, published by Harg. p. 10.

Commons, and so no law could be made without the consent of the major part of the Spiritual Lords, and the major part of the Temporal Lords, as well as the most part of the Commonality: I say, these objections are vain. For though it be true, that two of the three estates are constituents of the Lords House, yet they constitute but one house. And the laws and customs of the kingdom, which are the true measure of all bounds of power, have given a negative voice of either house upon the other, and of the King upon both; but have not given a negative voice of only one of the two estates constituting the Lords House unto the other, or to the Commons being the third estate; the legislative power being lodged in the King, with the assent of the two Houses of Parliament as such, and not with the assent of the three estates, simply considered as such; for it is the settled constitution and custom of the kingdom, that fixeth and defineth, where the legislative power is lodged, not notions and fancies*."

The Lord Keeper Guildford held the same language†. *Swift* too asserts the same doctrine‡. *Tindal* uses the same language§, and Judge Blackstone, *ipse agmen*, expresses himself in the same manner as *Coke*, *Hale*, and *others*‖. *Sullivan*¶ and Professor *Millar* seem also of opinion, that the King does not form one of the three estates**. It is observable also, that in the Form of Prayer with Thanksgiving, to be used on the 5th of November, thanks are given for the happy deliverance of King James the 1st, *and* the three estates of England."

In Scotland, from the earliest times, the King, it seems, did not form a part of the three estates. In that important act passed in 1473, whereby King Robert the Second proposed to secure the succession, it

* See Hale's Jurisdiction of Lords House of Parliament, published by Hargrave, pp. 10, 11.

† See the Speech he prepared for James the IId, 2d vol. North's Life of Lord Keeper Guildford, p. 193.

‡ 5 Vol. Swift's Works, p. 315, Nichols's edit.

§ 1 Vol. Continuation of Rap. p. 111.

‖ 1 Vol. Black. Comm. p. 153. ¶ Sullivan's Lectures, p. 202.

** Millar on Government.

is expressly recited to be enacted, by King Robert, "with the advice and consent of the whole three estates*."

In all the Gothic monarchies established in Europe, the various orders of persons called together, for council and advice, bore the name of states of the kingdom. Hence, the three estates of France, of Spain, of the German Empire, and of Denmark, and Sweden, existed with their monarch at the head of them. That acts, without the assent of the bishops, have passed and have been held valid, *Selden* and *Sir Edward Coke*, as Blackstone observes†, afford many instances; and so does the celebrated Letter of Lord Holles‡. "In such cases says *Serjeant Wynne*§, who seems not to have been aware of the instances put by *Selden* and *Coke*, "I apprehend the bill must pass notwithstanding the dissent of the Spiritual Lords. Whether," says he, "the insertion of the consent of the Spiritual Lords should be continued in the bill in such case, being an averment contrary to the fact, or whether that insertion is rather matter of form, (for though ancient, it has not been regular nor uniform,) might be matter of question? but suppose a more stronger and probable case, that the majority of Bishops were against a bill, and the rest of the bench concur with the majority of the Temporal Lords in passing it, the expression of the act would in that case be realized, and I make no doubt the bill would pass, or else it must be allowed, the majority of the Bishops might at any time control the majority of the House. But if the Bishops are really a distinct state of the realm, the majority of their order is as necessary to every legislative act as the consent of the majority of the Commons is to pass a bill through their House. So that in whatever light the case is considered, it appears the Bishops do not sit in parliament as representatives of the clergy, or can be considered as a distinct estate of the realm‖." The *Act of Uniformity*, 1 *Eliz. c.* 2, was passed, though

* See *Jus Regium*. † 1 Vol. Comm. pp. 156, 7.

‡ Letter of a Gentleman to his Friend, &c. p. 7. § Eunomus, Dial. 3, s. 17.

‖ Eunomus, vol. 3, p. 72. The passage thus quoted, forms one of the great mistakes to be found in that elegant law book, *Eunomus*.

voted against, by all the Bishops, and the Lords Spiritual are not mentioned in the act. Because the Bishops form one of the estates, it did not therefore follow, that their consent was necessary to the perfection of a law; this erroneous doctrine, which *Warburton**, as well as *Wynne* espoused, is refuted by *Sir Matthew Hale*, in that passage of his before quoted.

In the reign of Edward IId, the Bishops claimed to be considered as *a fourth estate*, distinct from the Lords Temporal, and to have a *negative* in passing law, equal with the Commons, or with the Lords, or even with the King himself, and this extraordinary claim occasioned great calamities†. In the early part of the reign of Henry the VIIIth, the judges so far from countenancing the claims of the Bishops to be a fourth estate, declared their opinion to be, that the King might hold a parliament, without any Spiritual Lords‡!

In the unfortunate reign of Charles the First, twelve of the Bishops having been insulted by the mob in their way to the House of Peers, and some of their robes torn, they signed a protest, and delivered it to the King, who immediately sent it to the House of Peers, importing, "That they durst not sit and vote in the House of Peers, unless they were protected from the tumults; and they did protest against all laws, orders, votes, resolutions and determinations, as in themselves null, and of none effect, which in their absence, since the 27th December, 1641, had already past, and should pass in that House during the time of this their forced absence§." Upon this, the Commons impeached the Bishops of high treason, for presenting that protestation, in regard they claimed to be a distinct estate, having a voice upon the matter as negative in parliament, and therefore the Commons urged that this proceeding of the Bishops, tended to subvert the constitution, and to change the fundamental form of government. But the Commons did not proceed with this impeachment, but contented themselves with passing a bill, (16 Charles I. c. 27,) for taking away the Bishops votes in parliament.

* *Alliance between* Church and State, p. 128.

† Acherly Brit. Const. p. 691, 2. ‡ Keilway's Rep. 184.

§ 1 Vol. of Clarendon's History, p. 350, &c.

No bishops were summoned to the first two parliaments of Charles the IId; nor did they reappear in parliament till the 13th of Charles the IId, which repealed the before-mentioned act of Charles I.

Upon the whole therefore, I take it to be abundantly clear, that the Lords Spiritual form a separate estate in parliament, but that they have not a distinct negative voice, and that when in modern times, the King has been termed one of the three estates, it may generally be attributed to an unconsidered laxity of expression.

"*Whereas the late King James the Second, by the assistance* "*of divers evil* Counsellors, Judges, *and Ministers, em-* "*ployed by him, did* endeavour *to subvert and extirpate* "*the Protestant* Religion, *and the Laws and Liberties of* "*this Kingdom.*"

COMMENT.

"*Evil Counsellors, Judges, and Ministers.*"—King James was an enthusiastic bigot, and would probably have turned a deaf ear to any advice which was offered to him in opposition to his projects, but certain it is, that never was any king beset with such vermin as this king was. I can never reflect with patience on the detestable hypocrisy of Sunderland. To think of him, artfully luring on his king to destruction, fills me with horror and detestation. His celebrated *Apology* shews his art, rather than his innocence. It was this man, who, as it seems, excited Monmouth into rebellion, and then deserted him, and abetted his execution! At once the pensioner of France, and of the Prince of Orange*! Such a man ought not to have died in his bed. Many fatal advisers surrounded the throne, but this man, I think, notwithstanding all his apologies, was the basest and most pernicious of them all.

It was but too true, that some servile judges had conspired with James to assist him in trampling on the liberties of the people; as was manifest from the decision in Sir Edward Hale's case, and in the

* See *Macpherson's State Papers*, 2 vol. 147. 150.

trial of the Bishops, as well as on other occasions. One honest judge there was, for when the King closeted Sir Thomas Jones, respecting a dispensation of the Test and Penal Laws, and the King told him, "He would have twelve judges that should be for it," Sir Thomas replied, "he might have *twelve judges*, but he never would have *twelve lawyers*." When *Sir Matthew Hale* was solicited by Charles the IId. to be a judge, that great man accepted the office, but plainly told the King, if any thing was pressed upon him, which was against his judgment, he would quit his post*." Twelve such judges as Jones, or as Hale, might have saved James from his destruction. That enlightened man, *Lord Bacon*, contributed, by some of his immortal writings, to mislead the judges. For instance, in one place in his writings, he compares the judges to planets. The comparison I will not quarrel with, though I fear some of them have been more like comets, portentous, fiery, and dangerous in their course. But mark the courtly and destructive corollary, which Bacon draws from his simile, "Do therefore as they do, move always, and be carried with the motion of the first mover, which is your Sovereign†." In the same degenerate tone he penned the History of Henry the VIIth, the first work he engaged in after his disgrace, and laid as a peace offering at the feet of his master, the despicable James the First, who affected to consider his great grandfather, the abject and avaricious Henry, as a model of a king‡. It is painful to point out the faults of so great a man as Bacon was, but nothing is more mischievous than the faults of great men.

It is not very honourable to the judges of this period, that "*divers*" of them should be stigmatized with the charge of advising their Sovereign to act unconstitutionally. Avarice or ambition, to what lengths can you goad, even educated minds! Bad judges have been the curse of kings. *Tresillian*, *Scroggs* and *Jefferies* polluted the government of which they were a part. Well might Sir Matthew Hale exclaim that,

* Emlyn's Preface to Hale's Pleas of the Crown, p. 5.

† 4 Vol. Bacon's Works, p. 334, folio edit.

‡ Vid. Hayley's Works, 2 vol. p. 246. See also a Critique on Bacon's Works, by Sir Richard Steele, in No. 25 of the Guardian.

"twelve red coats in Westminster Hall, were able to do more mischief to the nation, than as many thousand in the field." Experience justifies the observation.

If the judges had not sanctioned the claim of *Ship-money*, in the time of Charles the First, that prince, probably, would not have lost his head. The wisdom of *Clarendon* is no where more conspicuous than in his remarks on those judges. "If these men," says he, "had preserved the simplicity of their ancestors in severally and strictly defending the laws, other men had observed the modesty of theirs in humbly and dutifully obeying them*." If the judges had not sanctioned the claim of *a dispensing power*, in the time of James the IId. that prince, probably, had never lost his throne. The statutes of William, and one of the acts of his present Majesty, have greatly tended to establish the independence of the judges, as before observed, p. 82, and diminish the temptation to a criminal servility. Still however it is *possible*, though (judging from appointments) not *probable*, that a *puisne* judge may look forward to a chief justiceship; a chief justice, to the chancellorship, or cabinet council. It is, too, optional in his Majesty, whether on the resignation of the judges, after fifteen years service, or permanent infirmity, he will grant them a pension or not†, so that the judges are still, in some degree, assailable on the side of ambition and avarice. Nothing, however, at present, can be purer than the administration of British justice. The Chancellor, whose power is greater than that of any other law officer, is still removable, at the pleasure of the Crown, and an annuity on his resignation is optional, so that there are very strong temptations to servility on his part; but at the same time it must be observed, that he, of all the judges, is the most proper to be removable, for such is the nature of the business of his court, that politics can seldom taint his decisions.

The "*evil counsellors and others*," complained of, were through the policy or the lenity of King William, suffered to escape, though many were exempted out of the act of indemnity. Jefferies, indeed, was almost torn to pieces by the populace. His disgraceful end

* History, 1 vol. 55.

† See 39 Geo. III. ch. 110. This act does not seem framed in the same spirit, as the 1 Geo. III. c. 25.

is particularly mentioned in North's Life of the Lord Keeper Guildford. If he came into power like a lion, he left it like a dog. With the exception of this unworthy man, the King alone suffered. The old maxim, that the King can do no wrong, because his ministers are accountable for all he does, was here quite reversed, and it seemed as if the maxim were, that ministers can do no wrong, because the King is accountable for their misdeeds. The escape of these delinquents was justly regretted by the considerate part of the nation.

King James was strongly attached to the *Jesuits**, a most pernicious order of Catholics; as may be gathered from a perusal of their detestable tenets. Father Petre was a jesuit, and is supposed to have much misled James. It was against the Jesuits, that *Pascal* pointed his admirable work, "*Les Lettres Provinciales*," which lays open their sanctimonious frauds. There was scarcely a vice of which they had not some execrable sophistry at hand to excuse. The mischievous principles of this order of men may be judged of from a brief specimen of their tenets. They held, "That faith is not to be kept with heretics—that it is an honour to kings, to be slaves to the pope—on no account to act by an impulse of special favour—never freely to pardon any one's offence, nor to have any opinion of their own—to be won to compassion by entreaty, they reckon a crime—to be compassionate, a heinous offence—and if one be moved to do any thing through pity, he ought to make atonement for it before a priest, by confession and penance—lastly, that nothing is a greater sin, than disobedience to the priest, or a defect of due obedience to his injunctions, while they themselves refuse obedience to any other than the pope, and will not be bound by human laws†."

"*Endeavour to subvert*," *&c.*—This word, *endeavour*, is very expressive, and was very anxiously and cautiously used. It implies, that what was only endeavoured, was not accomplished, and that the religion, laws, and liberties of the nation, remained unsubverted. Those of the Whigs, who were for a republic, were anxious to use the present opportunity to depress the crown, to render it perpetually elective, and, indeed, almost to subvert it; and for this purpose, they asserted, that

* 8 Hume, 219. † Vide 1 vol. Cunningham's History, p. 59.

the whole government was at an end, and seemed desirous to consider all *properties, honours,* and *rights,* as dissolved. "If," says *Sir Robert Sawyer* (in the debates in the convention) "the constitution is *dissolved,* the Lords then would only represent their own votes as individuals, and ought not to meet as an estate*." "It is worthy observation," says Blackstone, "that the convention avoided, with great wisdom, the wild extremes into which the visionary theories of some zealous republicans would have led them. They held, that the misconduct of King James amounted to an endeavour to subvert the constitution; and not to an actual subversion, or total dissolution of government, according to the principles of Mr. Locke, which would have reduced the society almost to a state of nature, would have levelled all distinctions of honour, rank, offices and property, would have annihilated the sovereign power, and in consequence have repealed all positive laws, and would have left the people at liberty to have erected a new system of state, upon a new foundation of policy. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne, whereby the government was allowed to subsist though the executive magistrate was gone, and the kingly office to remain, though King James was no longer king. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished or even suspended†." "If," says an able writer, "in the case of kings, the very bare design or *endeavour* to destroy them, be sufficient, though it be never reduced into act, I cannot see why, by the same rule, the *endeavours* of kings to destroy the fundamental constitution of a mixt or limited kingdom, should not have the like construction in respect of them‡."

* Vide Mr. Somers's Minutes of the Debates, in Appendix, No. I.

† 1 Vol. Black. Com. pp. 212, 213. See what Burnet says, 1 vol. Hist. Own Times, p. 814; and see also York on Forfeitures, p. 118, third edition, who enlarges with much judgment on the subject.

‡ Vid. Bib. Polit. Dial. 11, 1 vol. p. 813, octavo edit.

" 1*st*. *By assuming and exercising a power of dispensing with* " *and suspending of Laws, and the execution of Laws without the* " *consent of Parliament.*"

COMMENT.

This subject has before been adverted to, p. 164. In *Ecclesiastical*, *Civil*, and *Military* affairs, persons were employed by King James, without taking the Test Oath, as prescribed by an act of parliament. That act, the King pretended to dispense with, and suspend. Papists sat in council! Papists were appointed judges! Papists were constituted sheriffs, and justices of the peace; and many officers in the army, and soldiers were displaced, and Catholics introduced in their stead. In *Ireland*, Protestants were by degrees put out of situations of trust, and their places supplied by Catholics, who monopolized all power; and all this, in contravention of an express act of parliament! How the *law* was as to a dispensing and suspending power, will presently be considered.

" 2. *By committing and prosecuting divers worthy Prelates,* " *for humbly petitioning to be excused from concurring to the* " *said assumed power.*"

COMMENT.

Allusion is here made to the conduct of James towards the *Seven Bishops*, of which such ample mention has already been made, in the *third* chapter of this work. It was a just remark of Sir John Hawles, that " undue and irregular prosecutions, were one of the great and immediate causes of the Revolution." The law as to petitioning, will be stated, when we come to consider the *declaratory part* of the Bill of Rights.

" 3. *By issuing and causing to be executed a commission under* " *the Great Seal, for erecting a Court, called,* THE COURT OF " COMMISSIONERS FOR ECCLESIASTICAL CAUSES."

COMMENT.

The unrestricted and alarming power of this court is set forth in the Report of the Committee appointed after the Revolution, to consider the case of the *Lord Chancellor Jefferies.* The Report states, "The said late Lord Chancellor Jefferies passed under the Great Seal, a commission dated the 15th of July, in the second year of the late King James the Second, to William, Lord Archbishop of Canterbury; George, Lord Jefferies, Lord Chancellor of England; Lawrence, Earl of Rochester, Lord High Treasurer of England; Robert, Earl of Sunderland; Nathaniel, Lord Bishop of Durham; Thomas, Lord Bishop of Rochester; Sir Edward Herbert, Knight, and Chief Justice of the Common Pleas, and by the inscription of the Seal appointed for the said Commissioners, it was styled a Commission for Ecclesiastical Causes; and therein it is expressed, That the late King James, by virtue and force of his supreme authority, and prerogative royal, he grants unto the said Commissioners full power and authority *over all the subjects, to inquire of and punish all their offences, transgressions, and misdemeanors whatsoever, done or to be done,* that can lawfully be by the spiritual or ecclesiastical laws of this realm: which comprehends all their sins whatsoever against God or Man."

"That there is further a special grant, to inquire and search out all the offences and misdemeanors of all ecclesiastical persons, of whatsoever dignity, and suspend or deprive them of their freehold, and of all their ecclesiastical functions at their will."

"That there is a further grant of absolute power over all the *marriages* of all the subjects, whereupon depends the descent of all the inheritances of the kingdom."

"There is also granted to them power to call before them all that shall seem, by themselves, to be suspected of any misdemeanors whatsoever; *and to examine them, against themselves,* about their whole lives, if they please; and to censure them as they shall judge of it; and all the several powers granted to them were to be so absolute, that they were authorised to excommunicate, and thereby expose to perpetual imprisonment, at their wills, all that should not obey any of their com-

mandments, or orders, in any part of their commission, if it were only for refusing to answer their questions, when they examined them against themselves, or for neglecting to assist in the execution of any of their commands."

"And as to ecclesiastical persons, their power was, to deprive them of their freeholds, and their functions too, if they should disobey, or neglect to accomplish the least of their commands or orders."

"That further power is also granted to them over the estates of all the subjects, to give, at their discretion, and to all informers and prosecutors against them, for any pretended misdemeanors or offences, whatsoever expense and costs of suit as they should think fit."

"That there is further granted to the said Commissioners, an absolute power over the Universities of Oxford and Cambridge, and cathedral and collegiate churches, colleges, and grammar schools, and other ecclesiastical incorporations, as to all their lands, rents, and revenues; and as to all their statutes, rules and ordinances, made by their founders, or any otherwise, though settled or confirmed by acts of parliament, or any grants of former Kings*."

Dr. Sharpe, who had preached against popery, was suspended. Dr. Compton, Bishop of London, for having favoured him, was inhibited from all exercise of his episcopal duties†. In vain, the Bishop urged the *illegality* of the Court, and pleaded to the jurisdiction. All his objections were disregarded. After this, new statutes were endeavoured to be imposed upon *Christ Church College*, in *Oxford*, and in *Sidney College, Cambridge*. The proceedings in this Court against *Magdalen College*, are well known, and filled the nation with the highest indignation.

By this same Court, nearly two hundred ministers of the gospel were suspended in the Diocese of Durham, only for refusing to read the King's Declaration (before noticed) for suspending the penal laws!

* Vide Journals of the House of Commons for 1689, 10th vol. pp. 148, 9. The proceedings by the Ecclesiastical Commissioners are more or less noticed by all of our historians.

† Vid. 1 vol. Cunningham's Hist. p. 67.

I have here only noticed some of the excessive proceedings of this Court. The royal apologist, Hume, cannot find one favourable word on its behalf. Its *illegality*, will be observed upon hereafter.

" 4. *By levying Money, for and to the use of the Crown,* " *by pretence of prerogative, for other time and in other manner* " *than the same was granted by Parliament.*"

COMMENT.

This has reference to King James's seizing that part of the customs and excise, which ceased to be payable by law, at the death of King Charles the Second. The officers of these two great branches of the revenue continued to levy it, and with severity, though, by so doing, in point of law, (according to the opinion of Chief Baron Atkins) they incurred a *premunire**. Many parts of the kingdom were so infatuated, that addresses were made to thank the King for this invasion of the law! One of these was sent from the Temple, and presented by Sir Humphry Mackworth, who owed his knighthood to that ignoble service.

The conduct of James, upon this occasion, admits of no palliation, nor could any thing more plainly evince his arbitrary designs, and his duplicity, than his illegal appropriation of the customs and excise. From Barrillon, the French Ambassador's letter to Louis XIVth, dated the 19th February, 1685, it plainly appears, James was conscious he was doing wrong. In one passage, the ambassador observes, that James said to him, " without this proclamation for a parliament, I should hazard too much, by taking possession directly of the revenue, which was established during the life time of my deceased brother. It is a decisive stroke for me to enter into the possession and enjoyment. For hereafter it will be made more easy for me, either to put off the assembling of parliament, or to maintain myself by other means, which may appear more convenient for me†."

* Atkin's Parliamentary Tracts, p. 316.

† Vid. 2 vol. Dalrymple, pt. 2. p. 103.

In another part of this letter, the Ambassador reports James to have observed to him, as follows: "It is your part to explain to the King your master, what I say to you, that he may have no cause to complain of my having taken so hastily so important a resolution, *without consulting him, as I ought to do, and will do in every thing*; but I should have hurt my affairs extremely, if I had deferred it only eight days; for I should have continued deprived of revenues which I now preserve, and the least opposition on the part of those who refused to pay the duties, would have engaged me in levying them by force; instead of which, *I shall pretend, now I have the law on my side*, and it will be very easy for me to reduce those who would oppose what I do." What a scene is here exhibited! a British King hypocritically tyrannising over his subjects, and accounting for his conduct to the French King!! The seizing of the customs by James, is strongly censured by the immortal Fox. "This violation of law," says he, "was in itself most flagrant. It was applied to a point well understood, and thought to have been so completely settled by repeated and most explicit declarations of the legislature, that it must have been doubtful whether even the most corrupt Judges, if the question had been used, would have had the audacity to decide it against the subject*."

See as to the *law* on this important subject, *post*.

"5. *By raising and keeping a Standing Army within this "kingdom in time of peace, without consent of Parliament, and "quartering Soldiers contrary to law.*"

COMMENT.

At the death of Charles the Second, the standing army amounted to about 8500 men. On account of the Duke of Monmouth's invasion, it was increased by James the Second to 16,000, and afterwards to 30,000. In a speech to parliament, James the Second told them, "he had increased his army, put in officers not qualified by the Test, and that he

* Fox. Hist. p. 91.

would not part with them." As this was not altogether approved of by parliament, it was first prorogued, and afterwards dissolved. James afterwards added some Irish regiments to his force, and the whole of it, amounting to 24,000 men, was encamped on Hounslow Heath. To this, allusion has before been made (*ante*, p. 176.) In *Ireland* and *Scotland*, the standing army was also increased. In England, the soldiers were quartered even in private houses, and their insolence was so great, that no person could sleep in security. Riots, robberies and rapes were committed with impunity, and the only offence that was punished, was desertion, which was judged by martial law in time of peace; and Sir John Holt (afterwards Chief Justice of the King's Bench) is said to have been dismissed from the Recordship of London, because he refused to condemn a man to death on that account*.

As to the *illegality* of standing armies in time of peace, see *post*.

With respect to quartering of soldiers, it seems, that formerly, as there were no standing armies, so there was no quartering of soldiers in time of peace, and there was no provision made for quartering any at common law, or by any statute. Yet sometimes our Kings did thus oppress the people. In the two first reigns after the Conquest, it seems to have been a practice, to give free quarter in private houses, even against the will of the owner; for Henry I. in his charter to the City of London, exempts them, thenceforth, from that burthen. *Neque de meâ familiâ nec de aliâ, vi, alicui hospitiam liberetur*†.

In the reign of Edward III. the Commons in Parliament, complained of being oppressed with the free quartering of soldiers‡. And in 8 Henry VI. the Commons petition that all such soldiers as pass through the realm, do pay for their victuals and lodging. To which the King answered, that he would be advised§. In the reign of Charles the First this quartering of soldiers was not only practised, but that, in such a degree, that the House of Commons complained of to the King,

* See Secret History of Europe, Part 2, p. 134, 5.

† Brady of Burghs, Appendix, p. 26. quot. Elly's Tracts, p. 353.

‡ Brady's Edward III. p. 239.

§ Cot. Abr. Records, p. 595. quot. Elly's Tracts, p. 353.

"That in apparent violation of the ancient and undoubted right of all your Majesty's loyal subjects of this your kingdom in general, and to the grievous and insupportable detriment of many countries and persons in particular, a new and almost unheard of way hath been invented and put in practice, to lay soldiers upon them, scattered in companies here and there, even in the heart and bowels of the kingdom, and to compel many of your Majesty's subjects to receive and lodge them in their own houses, and both themselves and others to contribute towards the maintenance of them, to the exceeding great detriment of your Majesty, to the general terror of all, and the utter undoing of many of your people*." And the same author observes, that in 2 Charles I. the soldiers broke out with great disorders, they mastered the people, disturbed the peace of families, and the civil government of the land; there were frequent robberies, burglaries, rapes, rapines, murders and barbarous cruelties. And unto such places as did not tamely submit to the councils of this Prince (though there was but little opposition to the measures of the Court at that time) the soldiers were sent for a punishment, and wherever they came, there was a general outcry. The highways were dangerous, and the markets unfrequented. But, in opposition to these practices, the Commons in Parliament affirmed, that every subject of this kingdom had a full property in his goods, and in the Petition of Right, they demanded it as their known freedom, not to have the soldiers and marines quartered upon any private persons, contrary to their consent.

By a clause in the act of parliament, 31 Charles II. c. 1, s. 54, it is declared and enacted, "That no officer, civil or military, nor other person whatsoever, should from thenceforth presume to place, quarter, or billet, any soldier or soldiers, upon any subject or inhabitant of this realm, of what degree, quality, or profession soever, without his consent;" and the quartering which is now allowed upon public houses, victuallers, and the like, is only by virtue of a clause in the Mutiny Act, which is made every year, and expires at the end of it; so that it is entirely at the will of the parliament, whether this power shall be continued

* Rushw. vol. 2, p. 424. quot. Ellys's Tracts, p. 353, 4.

in the crown or not. And in all the mutiny acts, provision is made, that the provisions given to the soldiers and their horses, shall be paid for duly at settled rates*. Nothing, says Blackstone, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. "It should be wholly composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people: no separate camp, no barracks, no inland fortresses should be allowed†."

"*6th. By causing several good Subjects, being Protestants,* "*to be* DISARMED, *at the same time when Papists were both* "*armed and employed, contrary to law.*"

COMMENT.

Under a pretence, furnished by *Monmouth*'s invasion, King James ordered, that the arms of the militia in *Ireland*, should be brought in and deposited in the magazines of the different counties, and a proclamation for that purpose was issued. Nor was this all: it was given out, that if *any person* reserved arms, under any pretence, such as that they were their own, and did not belong to the public, *it would be interpreted as a proof of disaffection.* Such was the terror which accompanied this menace, that numbers delivered up the arms they had bought themselves‡.

On the subject of *arms*, see further, *post*.

"*7th. By violating the Freedom of Election of Members to* "*serve in Parliament.*"

COMMENT.

The *freedom of elections* had been violated in various ways. All the *quo warrantos* were so many violations of the freedom of elections.

* See Ellys's Tracts, p. 353, and see Millar's History, p. 464.

† 1 Black. Comm. p. 414. ‡ See 1 Ralph, p. 924.

Burnet alludes to the artifices employed by King James, to render the elections in 1685, conformable to his views. "All arts," says he, "were used to manage elections so that the King should have a parliament to his mind. Complaints came up from all parts of England of the injustice and violence used in elections, beyond what had ever been practised in former times. And this was so universal over the whole nation, that no corner of it was neglected. In the new charters that had been granted, the election of the members was taken out of the inhabitants and restrained to the corporation men, *all those being left out who were not acceptable at court.* In some boroughs they could not find a number of men to be depended on: so the neighbouring gentlemen were made the corporation men; and in some of these, persons of other counties, not so much as known in the borough, were named. This was practised in the most avowed manner in Cornwall, by the Earl of Bath, who to secure himself the groom of the stole's place, which he held all King Charles's time, put the officers of the guards name in almost all the charters in that county, which sending up forty-four members, they were for the most part so chosen, that the King was sure of their votes on all occasions*."

"8. *By* Prosecutions *in the Court of King's Bench, for "matters and causes cognizable only in Parliament, and by divers "other arbitrary courses."*

COMMENT.

"*By Prosecutions,*" *&c.*—The case of William Williams, Esq. (afterwards *Sir William Williams,*) is supposed, more particularly, to have led to this part of the Bill of Rights. After the dissolution of the parliament held at Oxford, an information was brought by the Attorney General, in the King's Bench, in Trinity Term, 36 Charles II. for a misdemeanour, for having printed the information against Thomas Dangerfield, which he had ordered to be printed when he was Speaker,

* Vid. 1 vol. Burnet's History of his Own Times, p. 625.

by order of the House. Judgment was passed against him on this information in the 2d year of James II. This proceeding was deemed so great a grievance, and so high an infringement on the rights of parliament, that it appears to be the principal, if not the sole object of this first part of the eighth head of the means used by King James to subvert the laws and liberties of the kingdom, as set forth in the Declaration of the two Houses. This very evidently appears from the account given in the Journals of the House of Commons for the 8th of February, 1688*; for it will be seen, that the eighth grievance in the *Declaration of Rights* was *at first* thus stated, "*By causing informations to be brought* and prosecuted in the Court of King's Bench, for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses." To this article, as thus framed, the Lords objected, "because they do not fully apprehend what is meant by it, nor what instances there have been of it; which therefore they desire may be explained, if the House should think fit to insist further on it†." The House of Commons disagreed with the Lords in their amendment of leaving out the eighth article. But in respect of the liberty given by the Lords of explaining that matter, the House resolved, that the words should stand in this manner. "*By prosecutions* in the Court of King's Bench, for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses‡." Thus, by this amendment, the Commons adapted the article more correctly to the case they had in view, for the *information* was filed against Sir William Williams in Charles the Second's time; but the *prosecution* was carried on, and judgment obtained in the second year of King James. A strong proof this, amongst many others, of the great exactness with which the *Declaration of Rights* was penned.

Corresponding to this eighth article of grievance, mentioned in the

* 10 Vol. Journals of the House of Commons, p. 22.

† Vide Journals of the House of Commons, for 11th February, 1688, 10th vol. p. 25.

‡ Vid. Journals of the House of Commons, for 12th February, 1688, 10th vol. p. 26.

Declaration of Right, is the assertion of the right of the subject, as expressed in the ninth declaratory article of the *Bill* of Rights.

On the 12th July, 1689, the House of Commons resolved, that the judgment against William Williams, Esq. (afterwards Sir William Williams,) late Speaker of the House; in the parliament held 25th Oct. 32 Charles II. given in the Court of King's Bench, in Easter Term, 2d James II. for matters done by order of the House of Commons, and as Speaker thereof, is an illegal judgment, and against the freedom of parliament; and it was resolved, that a bill be brought in, to reverse the said judgment. The bill was twice read, but went no farther in that session*.

"*Divers other arbitrary courses.*"—The Declaration of Rights only mentioned some of the principal enormities in the reign of James the Second, but the catalogue might have been greatly extended.

"9. *And whereas of* LATE YEARS, *partial, corrupt, and* "*unqualified persons, have been returned and served on* JURIES, "*in trials, and particularly, divers jurors in trials for* HIGH "TREASON, *which were not* FREEHOLDERS."

COMMENT.

Some of the enormities of the preceding reign are here adverted to. The foul practice of *packing* juries, was such, that by this method some of the best blood in England was spilled. By this means *Lord Russell* was, in the forms of justice, *murdered.* He challenged the foreman of his jury, because he was not a *freeholder*, as he had a right to do, but it was in vain. By such juries, *Colledge* was hanged at *Oxford*, after he had been acquitted in *London.* By such juries, *Col. Sidney* was brought to his end, for answering Filmer's paltry work. The trial by jury would be of no avail, and only a shameful mockery of justice, if juries are corruptly chosen. No ills are of a more hateful

* Vid. Reports of the House of Commons, 3 vol. p. 11.

and galling nature, than those done under colour of, and according to the forms of justice.

See *post*.

"10*th*. *And* EXCESSIVE BAIL *hath been required of persons* "*committed in* CRIMINAL CASES, *to elude the benefit of the* "*laws made for the liberty of the subject*."

"11*th*. *And* EXCESSIVE FINES *have been imposed, and* "*illegal and* CRUEL PUNISHMENTS *inflicted*."

COMMENT.

"*Excessive fines*."—*Excessive fines* did not commence with the reign of *James the Second*. The celebrated *Hampden*, for resisting the unwarranted claim of ship-money, was fined in the monstrous sum of £40,000*!

In the reign of Charles the IId. *Pilkington, Colt, and Oates*, were fined £100,000 each, for having *spoken disrespectfully* of the Duke of York! *Barnardiston* was fined £10,000, for having, in a private letter, expressed sentiments, deemed improper†. After the Revolution, Barnardiston's case was considered, and the judgment was reversed, and the reasons for the reversal entered on the Journal‡ as follows: 1st. "The information of this case being grounded upon letters, which in themselves were not criminal, but made so by *innuendoes*, it was declared that *innuendoes*, or supposed, or forced constructions, ought not to be allowed; for all accusations should be plain, and the crimes ascertained." 2d. "That this fine of £10,000 is exorbitant and excessive, and not warranted by legal precedent in former ages, *for all*

* 3 Vol. State Trials, p. 855; and see what is said on that subject in Em. Pref. to the State Trials, p. xii.

† Fox's Historical Work, p. 45. See also what is said, 4 vol. State Trials, p. 165.

‡ Vid. London Journal, May 14, 1680.

fines ought to be, with a 'salvo contenemento suo,' and not to the party's ruin.*"

The *Duke of Devonshire, for caning* Col. Culpepper, in the King's Palace, was, in the third year of the reign of King James the Second, fined £30,000, and committed till paid†. Soon after the Revolution, in the year 1689, the House of Commons and the House of Lords both voted, "That the fine was excessive and exorbitant, against *Magna Charta*, the common right of the subject, and against the law of the land‡." See on this subject *post*.

"*Cruel punishments*."—The punishment of *Titus Oates*, in the reign of James the Second, was, in the Convention Parliament, resolved to be *cruel and illegal*§. And so it truly was; the man was bad enough, but the sentence was most barbarous. Oates was found guilty on two indictments for perjury, and the sentence was, to be fined a thousand marks on each indictment, to be whipped on two different days, from Aldgate to Newgate, and from Newgate to Tyburn; to be imprisoned during life, and to be pilloried five times every year‖. Soon after the Revolution, this sentence was taken into consideration, and conferences were had upon the subject between the two houses, of which more will be said hereafter.

The House of Lords at length, on technical grounds, affirmed the judgment against him, but thirteen lords entered their protests¶, and the two chief justices, Holt and Polexfen, and the chief baron Atkins, and six other judges, solemnly delivered their opinions in the Lords House, and unanimously declared, that the judgments against Oates were barbarous, inhuman, and unchristian, and that there was no precedent to warrant the punishment of whipping, and committing to prison

* See 1 vol. Burnet's Own Times, p. 637.

† Vide his Case in 11th vol. of State Trials, p. 133, Harg. edition.

‡ See 11 vol. State Trials, p. 136, and the Journals of the Houses of Lords and Commons.

§ See 10 vol. Journals of the House of Commons, p. 177.

‖ Vide 4 vol. State Trials; and 8 Hume, p. 225.

¶ 8 Vol. State Trials, p. 474.

for life, for the crime of perjury, (which however was only one of his punishments,) and that they were against law and ancient practice, and therefore ought not to be reversed*."

Shortly after the Revolution, the judgment against *Samuel Johnson*, a clergyman, who had written the life of the Emperor Julian, to shew that both civil and religious rights were in danger, was declared "cruel and illegal." Sir Edward Herbert, Ch. J. K. B. presided on his trial, yet, strange to say, Mr. Hume† terms Herbert "a man of acknowledged virtue." No one suffered more on behalf of "*the good old cause*," than this Samuel Johnson‡. He was a zealous Whig in his day, as his namesake, in aftertimes, was a zealous Tory.

"12. *And several grants and promises made of fines and* "*forfeitures, before any conviction or judgment against the* "*persons upon whom the same were to be levied, all which are* "*utterly and directly contrary to the known Laws and Statutes* "*and Freedom of this Realm.*"

COMMENT.

See on this subject, *post*.

"*And whereas the said late King James the Second, having* "ABDICATED *the government, and the throne being thereby* "VACANT, *his Highness the Prince of Orange, whom it hath* "*pleased Almighty God to make the glorious instrument of* "*delivering this kingdom from Popery and arbitrary power,* "*did, by the advice of the Lords Spiritual and Temporal, and*

* Vid. 8 vol. State Trials, p. 475, and 4 vol. p. 166, 205; and Em. Pref. xii.

† 8 Vol. History, p. 247.

‡ See an account of his ill treatment, in his Works; and see 4 vol. State Trials, p. 144, 205, and 8 vol. p. 466, 467, Harg. edit.

" *divers principal persons of the Commons, cause* LETTERS *to* " *be written to the Lords Spiritual and Temporal, being Protes-* " *tants, and other letters to the several Counties, Cities, Univer-* " *sities, Boroughs, and Cinque Ports, for the choosing of such* " *persons to represent them, as were of right to be sent to Par-* " *liament, to meet and sit at Westminster upon the two-and-* " *twentieth day of January, in this year one thousand six hundred* " *and eighty-eight, in order to such an establishment, as that* " *their religion, laws and liberties might not again be in danger* " *of being subverted. Upon which letters, elections have been* " *accordingly made.*"

COMMENT.

" *Having abdicated.*"—That King James had *abdicated* the government, is also asserted in another part of the Bill of Rights. We have already seen the disputes respecting the employment of this word *abdicate**. The thorough comprehension of the meaning of this word, is of high importance. " The word *abdicated,*" says Lord Somers, in a work of his, " relates to all the clauses aforesaid, as well as to his deserting the kingdom, *or else they would have been wholly in vain*†." That there might be no pretence for confining the abdication merely to the withdrawing, *Lord Somers* further observes, " that King James, by refusing to govern us according to that law, by which he held the crown, implicitly renounced his title to it." This is to the same effect as his speech on the use of the word abdicate, before adverted to.

Sir Joseph Jekyll observes, on Sacheverell's trial, that the word *abdicated* was insisted upon, and carried, for that it included in it the maladministration of King James, which the word *deserted* (desired to be used instead of it) did not‡." In Scotland, the King could not be said

* *Ante*, p. 214, &c.

† " Judgment of Whole Kingdoms, &c." s. 143. See also what Milton says in his Answer to Salmasius, Prose Works, p. 277, last edition.

‡ Sacheverell's Trial, p. 51.

to have withdrawn himself, since he did not reside in that kingdom, yet the Scots resolved, he had forfeited his throne. The forfeiture was occasioned by his acts, and not his withdrawing. Besides, in truth, the desertion was not voluntary, it was occasioned by fear, and James was anxious to return if he could have done so, and declared he would return, when he could do so with safety.

The crown is a trust, "and it is the very essence of every trust, to be rendered accountable, and even totally to cease when it substantially varies from the purposes for which alone it could have a lawful existence*." It is very clear therefore, that a king may by misconduct abdicate his throne and royal trust. It may be objected, that this doctrine runs counter to the maxim, that "*the King can do no wrong.*" In what reign this maxim was first promulged, is not very clear. Possibly it grew out of another well known axiom, "*Rex nihil potest, nisi quod jure potest;*" a comment upon which, may be found in *Bracton, Lib.* 3. *De Actionibus, cap.* 9, where he says, "the regal power is according to law; he has no power to do any wrong, nor can the King do any thing but what the law warrants." It was thus that Lord Somers explained the maxim†. It is very plain, I think, according to Bracton's sense of the expression, that the maxim in question arose rather from a regard to the liberty of the people, than to an extension of the prerogative, for the benefit only of the king. There is not a prerogative of the King that was conferred upon him for his own sake only; they were all meant for the benefit of the people; and what better title to his prerogatives could any king have? Certain it is therefore, that though ordinarily speaking, the King can do no wrong, this doctrine must be received with some qualifications, and it must be admitted, that he may act in such a manner, and so abuse his trust, as thereby to abdicate his throne.

* Vide 2 vol. Burke's Works, p. 333, quarto edition.

† Vid. "Judgment of Whole Kingdoms," sect. 6. See also on this subject, Plowden's Commentaries, p. 487, and see Woodeson's Lectures, 1 vol. pp. 81, 82. See also what Mr. Somers says on this maxim, in his "Just and Modest Vindication."

Selden seems to think, that the meaning of the maxim is, "that no process can be granted against the King*," and therefore, when *private rights* are invaded, the maxim may properly be said to be applicable." *Howell*, in the Preface to his celebrated work on *English Proverbs*, written about the year 1659, observes upon the two maxims, "The King can do no wrong," and, "The King cannot die," "These sayings," says he, "come near to maxims, but by the fatality of the times be now grown out of date." What would he have said in 1688, as to the maxim, that the King can do no wrong?

Swift in that admirable tract, intitled, "*Sentiments of a Church-of-England Man*," ingeniously observes, "The supreme power in a state can do no wrong, because whatever it doth, is the action of all; and when the lawyers apply the maxim to the King, they must understand it only in that sense, as he is administrator of the supreme power, otherwise it is not universally true, but may be controlled in several instances."

Having observed thus much on the import of the word *abdicate*, and on the maxim, that *the King can do no wrong*, it must be clear, I think, that when properly understood, these two maxims are not inconsistent with each other.

"*And the Throne being thereby vacant*."—The vacancy has before been adverted to. It follows from this declared *vacancy* of the throne, that a King, by *abdicating* his throne, is construed to abdicate, not only for himself, but also for his heirs, whether lineal or collateral. King James had, or at least asserted he had, a son, a "*son of prayers*," as he was called, and certainly he had daughters, but still the throne was declared *vacant*. If the son was *suppositious*, yet the daughters were not, so that the abdication amounted to a forfeiture *for himself and his heirs*. I cannot think so hardly of King James, as to suppose he would palm a son upon the world; and I am inclined to agree with *Mr. Hume*, that "though no particular attention had been before hand given to ensure proof, the evidence both of the Queen's pregnancy and delivery, was rendered in-

* See Table Talk, tit. King of England.

disputable; and so much the more, as no argument or proof of any importance, nothing but popular rumour and surmise could be thrown into the opposite scale*." Under that impression, well might Hume look upon the Revolution as "*a great precedent of* DEPOSING one king, and ESTABLISHING A NEW FAMILY†." It was such a precedent.

The *vacancy* was held to begin, from the time King James left the kingdom, the 11th December, 1687, 8; and therefore a patent dated 21st January, 1688, 9, to *Sir R. Graham*, creating him a Baron of England, by the title of *Lord Preston*, was held to be of no validity.

" *And thereupon the said Lords Spiritual and Temporal, and* " *Commons, pursuant to their respective* LETTERS *and Elections* " *being now assembled in full and free representation of this* " *nation, taking into their most serious consideration the* BEST " *means for attaining the end aforesaid, do in the first place,* " (AS THEIR ANCESTORS IN LIKE CASES HAVE USUALLY " DONE,) *for the vindicating and asserting their ancient Rights* " *and Liberties, declare*"—

COMMENT.

"*Letters*," *&c.*—There was not much difference, perhaps, whether the Lords and Commons were summoned by *writ* or by *letter*. In some old records, it appears, that letters were the proper mode of summoning parliaments. In King John's *Great Charter*, for instance, in the 17th year of his reign, he promises to summon the bishops, abbots, earls, &c. *per litteras nostras*‡.

It was much better than issuing writs in James's name, in imitation of what was done in Edward the Second's reign, in 1325; or what was done in Richard the Second's reign, in 1399.

* 8 Vol. Hume's History, p. 292, octavo edit. † Ib. p. 320.

‡ See Blackstone's Edition of the Great Charter, p. 14.

"*The best means.*"—By the word "*best,*" it clearly appears that the Lords and Commons made a choice from amongst a variety of means, by which it was supposed their ends might be obtained. So that what they did, was not from compulsion, and occasioned by a strict adherence to former proceedings, but was done from a conviction that it was best. It was unquestionably an *election,* I should not have commented on this word, had not Mr. Burke so unaccountably perverted its meaning in one of his celebrated works*.

"*As their ancestors in like cases have usually done.*"—Parliament itself, in 1 Richard III. affirmed, "That the Court of Parliament is of such authority, and the people of this land of such a nature and disposition, as experience teacheth, that manifestation and declaration of any truth or right made by the three estates of this realm, assembled in parliament, and by authority of the same, maketh before all other things most faith and certain quieting of men's minds, and removeth the occasion of doubts†." *Magna Charta* was but a confirmation of ancient rights‡. The *Petition of Right* too, like the Declaration, and the Bill of Rights, was *declaratory* only of the rights of the people, and of the common law.

"1. *That the pretended power of* SUSPENDING *Laws, or the* "*execution of Laws by Regal Authority, without consent of* "*Parliament, is illegal.*"

"2. *That the pretended power of* DISPENSING *with Laws,* "*or the execution of Laws by Regal Authority, as it hath been* "*assumed and exercised of late, is illegal.*"

* Vide "Reflections on the Revolution in France."

† Cotton's Abrid. of Records, pp. 713, 714.

‡ See Dug. Orig. p. 17, and Mat. Paris, p. 244, and the Recital in the 15 Edw. III. c. 1.

COMMENT.

Bishop Burnet states that, the dispensing power was not mentioned in the *Declaration of Rights**; but in this, as we have seen, he was greatly mistaken. The *Declaration* and Bill of Rights, both distinguish between the *suspending* of laws by regal authority, and the *dispensing* with them. The former, being a general and absolute abrogation, for a time, is by the Bill of Rights condemned without any exception, but the latter being only a special exemption of certain individuals, is only declared illegal, "*as it hath been assumed and exercised of late.*" But by a subsequent provision of the Bill of Rights, *(see post,)* the dispensing power is altogether taken away.

A dispensing power in any shape, was so monstrously repugnant to the spirit of the English constitution, that it might safely be pronounced illegal, but the use of it, *in some cases*, had been so early introduced, and was sanctioned by so many precedents, that the Judges, consistently with their oaths, were not at liberty in such cases to deny the existence of dispensing power, so that the duty of disavowing and condemning it, devolved on the legislature.

A dispensing power in the King, so far from being a prerogative claimable by *prescription*, as all prerogatives must be†, was wholly unknown to the common law, and had no foundation in the ancient laws of England. *Henry the Third*, following the example of the Pope, appears to have been the first who introduced *non obstantes;* and this was done about the end of his reign, in the year 1252. They seem to have been first used, when that arbitrary Prince was desirous of revoking some charters granted by his predecessors‡. *Mat. Paris* records an exclamation of this Henry, to the *Master of the Hospital of St. John of Jerusalem, in Clerkenwell,* "Does not your Lord, the Pope, sometimes, yea often, revoke his own deeds? does he not, by inserting the obstruction for a *non obstantes* quash his former

* 1 Vol. Burnet's Own Times, p. 823, fol. edit. † Plowd. 319, 322.

‡ Prynne's Animadversions, p. 133.

grants? so will I infringe this and other charters which my predecessors and myself have rashly granted." To this the master, in a spirited manner, replied, "God forbid you should use this unpleasant and absurd word," (non obstante;) "as long as you observe justice you may be king, and as soon as you violate it you will cease to be king*." Here then, *non obstantes* appear to have began, in imitation of the lucrative claims of the Pope†, which were first made, in the latter ages, by Pope Innocent the Third‡, who dispensed with the canons of the church, by a clause of *non obstante*, and these dispensations had been inveighed against by Henry III. though he himself afterwards imitated them§. What dismal apprehensions the first promulgation of this doctrine occasioned, may be seen not only in the bold reply of the *Master of the Hospital of St. John*, before adverted to, but also by the feeling and honourable exclamation of *Roger de Thurkeby*, (a Judge of the Common Pleas, in Henry the Third's reign,) when a *non obstante* was insisted on before him. "*Ab alto ducens suspiria. De predictæ adjectionis appositione. Dixit heu! heu! hos ut quid dies expectavimus ecce jam civilis curia exemplo ecclesiasticæ coniquinatur et a sulphureo fonte rivulus intoxicatur.* A plain proof this, that dispensations were then unusual.

From the time of Henry the Third, the dispensing power was often exercised and often inveighed against and resisted.

In the reign of *Edward the Third*, it was exerted, and so it was by his successor *Richard the Second*, in the second year of his reign, and was approved by all the Judges! but by an act in the fifteenth year of this same Richard, (so much insisted on in the Bishops Trial, *ante*, p. 151,) the King was expressly enabled to relax the Statute of

* Mat. Paris, p. 760, 810, 854.

† See the case of *commendams* Sir John Davis's Reports, p. 69. See also Vaugh. Rep. p. 348, and Stillingfleet's Eccl. Cases, 1 vol. p. 126.

‡ Burnet's History of the Reformation, p. 101.

§ Vid. Mat. Paris, p. 757. See also Stillingfleet's Eccl. Cases, and Prynne's Animadversions, &c. p. 132.

Provisors for a time*; a clear acknowledgment, as it seems, that he could not in that case, by his prerogative alone, dispense with the Statute; for otherwise the Statute was not necessary†. So unacknowledged were these dispensing doctrines at that period.

Sir Edward Coke, expressly says, that in the second year of the reign of Henry the VIIth‡, all the Judges in the Exchequer Chamber, in the Sheriffs case, allowed of a dispensing power§; and so he says, all the Judges did in the same Court, in the time of James the Ist.‖. Ch. J. Hobart has also expressed himself in favour of dispensations¶. Bacon too, was an avowed advocate for a dispensing power.**

The doctrines of *Hobart*, of *Sir Edward Coke*, and of *Lord Bacon*, in favour of a dispensing power, were calculated to mislead unwary minds, for though the cases from whence they draw their corollaries, and in particular, the case in the Year Book, 2 Henry VII. fol. 6, pl. 20, were open to much observation, and do by no means warrant their conclusion, as is well shewn by *Petyt*††, *Ch. Baron Atkins*, and *Mr. Atwood*‡‡; yet no man, not a lawyer, could be much to blame, who suffered himself, without further inquiry, to be led astray by such acknowledged sages of the law. That James the Second should suppose he had a dispensing prerogative, even to the extent in which he claimed it, is not very surprising, and it is his obstinacy, his displacing of Judges, and the ends for which he employed this prerogative, that form, as it seems to me, the chief matter of blame, in regard to this subject. The heed-

* Vid. Rot. Parl. 3 vol. p. 285, No. 8.

† See to the same effect, 16 Richard II. Rot. Parl. No. 8; and 20 Richard II. No. 21 and 22. See also to the same effect, 1 Henry IV. No. 85; 2 Henry IV. No. 26.

‡ Vid. Year Book, 2 Henry VII. p. 6, pl. 20.

§ 12 Co. p. 18, and see what he says in Calvin's case, 7 Co. 14.

‖ 1 Co. 571. ¶ Hob. Rep. 148. ** Vide Maxims of the Law.

†† Jus. Parliamentarium, p. 154, &c.

‡‡ Vid. Atkins's Tract "On the Power of dispensing with Penal Statutes?" and Atwood's Examination of the Argument of Ch. J. Herbert. These tracts are printed in the State Trials. Hargrave's edit.

less manner in which the Judges gave their opinions, in Hale's case, led to a general and a dismal misapprehension of the subject. That the ancient doctrine, as to dispensations, was very perplexed, is admitted by Ch. J. Vaughan, who observed, " that no steady rules had been given by the books."

That a dispensing power had been long practised *to a certain extent*, seems admitted, even by Sir Robert Atkins, the most enlightened opposer of a dispensing power; for though he ably and strenuously denies that there was a prerogative to dispense *with a disability imposed by Act of Parliament;* he expressly says, " I do not purposely dispute it in any other case, but as they are coincident with this*."

In the 34th Henry VIII. a claim was made not only of a prerogative, to dispense with existing Acts of Parliament, but also such as should be *hereafter made;* but the judges summoned nerve enough to determine, that the King could not dispense with future Acts of Parliament, though he might with things in future, of which he had the inheritance†.

In the reign of *Charles the First,* Mr. Glanville expressed it to be the sense of the House of Commons, that the King might dispense with Statutes, where the thing prohibited was *mala quia prohibita,* and not *malum in se*‡; and Ch. J. Vaughan allows, that this rule, when properly understood, was correct§.

It is very plain, from the precedents, that a succession of Judges, adjudged a dispensing power to be in the crown; but on a review of the cases it appears, that it was a *limited power, and not exerciseable upon all occasions.* The King could not dispense with the *common law,* or dispense with the rights of *others*‖. As to those Statutes that concerned the *King himself in his revenue,* or the like, or in cases where no disability was imposed on a person by the Act, but only a pecuniary penalty was given to the King, there the King, it seems,

* Atkins's Tracts, 248. † 1 Vol. Dyer's Reports, p. 52, last edit.

‡ Rushworth, 23d May, 1628, pt. 1, 1 vol. p. 568, 574.

§ Vid. Thomas and Sorrell, Vaughan's Reports. ‖ Vaugh. 350, 356.

might dispense with the penalty*. But, says Sir Robert Atkins, alluding to James the Second's dispensation with the 25th Charles the Second, c. 2, out of which Hale's case arose, "to dispense with an Act of Parliament made in a case of the highest concernment to the public that can be, wherein religion and the government are so deeply concerned, and where the King himself, and the Parliament, have thought fit to disable any person to do the contrary, and so pronounced it, and have put an incapacity upon persons, and adjudged the thing done to the contrary void; this hath been of later times, and but of late found out and practised, and is not warranted by any prescription†. Here lay the true distinction, but Hume entirely overlooked it. That the King could not dispense with disabilities and incapacities imposed upon any person by Act of Parliament, is clear from several cases‡. By this clear distinction, the dilemma, mentioned by Hume, vanishes. He says, that men "were reduced either to question the antiquity of the prerogative itself, or to assert that even the practice of five centuries could not bestow on it sufficient authority§;" and he refers to *Sir Robert Atkins*, but why, I do not comprehend, for *Sir Robert Atkins* himself, shews in the tract referred to, that whilst the antiquity of a dispensing power to a certain extent, and such as I have described, must be admitted; yet the existence of a dispensing power, *to the extent claimed by James*, must also be denied ever to have existed, either in theory or practice. Mr. Hume affords in his own person the best excuse for King James, in regard to the dispensing power, for surely it is not surprising, that a king, "*by flatterers besieged*," should think himself acting according to law, when a philosophical historian, so many years after, and

* Vid. Atkins's Parliamentary Tracts, p. 244.

† Vid. Sir Rob. Atkins's Parliamentary Tracts, p. 244; and Sir Edward Northey's able argument in Hale's Case, in Bacon's Abridgment.

‡ Vide *King* v. *Bishop of Norwich*, Hobart Rep. p. 75, and S. C. Cro. Jac. 385, and the case there cited of *Sir Arthur Ingram*. See also *Smith and Sherborne*, Moore, pl. 1299; and what Vaughan says, in Thomas and Sorrell, Vaughan's Reports, p. 354, 5.

§ 8 Hume, 248.

with so many materials before him, erroneously considers the dispensing power, *as exercised by James*, had the sanction of the practice of five centuries!

The condemnation of a dispensing power by the Bill of Rights, led some lawyers to suppose, that the crown could not pardon *murder*. But it was with very good reason adjudged otherwise, in the King's Bench, soon after the passing of the Act*.

" 3. *That the Commission for erecting the late Court of* " *Commissioners for Ecclesiastical Causes, and all other Com-* " *missions and Courts of like nature, are illegal and pernicious.*"

COMMENT.

See *ante*, p. 227, what is said as to the court erected by James II. The power of vicegerent was thought too great for one person†, and therefore was, by the 1st Eliz. c. 1, s. 18, transferred to commissioners, whom the Queen, and her heirs or successors, by that statute were authorised to appoint, and who formed that *High Commission Court* with ecclesiastical jurisdiction, against which such complaints were made in the reign of Charles I. and which was therefore abolished by the Statute, 16 Charles I. c. 11. By that Statute it is enacted, " That no new Court shall hereafter be created with the like power, jurisdiction, or authority." And by a clause inserted in the subsequent Act of the 13th Charles II. c. 12, s. 3, the Act of Charles I. taking away this Court, is confirmed, and the erecting any other like Court by commission, is forbidden‡.

It was in defiance of these Statutes that King James, of his own authority, thought proper to erect the Court, with such extraordinary powers before adverted to, which certainly, was contrary to express law.

* 2 Salk. 186. † 2 Vol. Burnet's History of the Reformation, p. 387.
‡ See as to the High Commission Court, Hurd's Dial. 2 vol. p. 284, &c.

"4. *That levying Money, for or to the use of the Crown,* "*by pretence of prerogative, without grant of Parliament, for* "*longer time, or in other manner than the same is, or shall be* "*granted, is illegal.*"

COMMENT.

By this part of the Bill of Rights, must be understood, not only express impositions and taxes, but all other methods that amount to the same thing. It appears, therefore, that the King cannot now raise or diminish the value of the coin, so as to endanger the property of the subject, without the consent of Parliament, and such seems to have been *Sir Edward Coke*'s opinion, even previous to the Bill of Rights*. *Sir Matthew Hale* appears to have been of a different opinion†, but *Blackstone* seems to agree with *Sir Edward Coke*‡. *Hale*'s words are, "All that a man can conclude upon these is, that it is neither safe nor honourable for the King to embase his coin below sterling; if it be at any time done, it is fit to be done by assent of Parliament, but certainly all that it concludes is, that *fieri non debuit*, but *factum valet*§."

On this subject, see the case of *Mixed Money*, in *Sir John Davis*'s Reports, which supports Hale's opinion. *Hakewell*, it is observable, in his celebrated speech on *Impositions*, expressly allows, that the raising and abasing of the coin, is part of the King's prerogative‖. Henry I. Stephen, Henry III. and Edward III. to answer their purposes, abased the coin, and no public complaint was made. *Queen Mary* and *Queen Elizabeth* did the same. In the speech of *Cook*, designed to have been delivered on the trial of Charles the First, if

* See 2 Inst. 577. † 1 Hale's Pleas of the Crown, p. 194.

‡ 1 Vol. Commentaries, p. 278.

§ Hale's Pleas of the Crown, 1 vol. p. 194.

‖ 11 Vol. State Trials, p. 39, Harg. edit.

he had pleaded, is the following passage: "Next he challengeth the prerogative to enhance and debase moneys, which by law was allowed him, *so far as to balance trade, and no farther;* so that if gold went high, beyond sea, it might not be cheap here, to have it all bought up and transported, but under the colour of that, he challenges a prerogative, that the King may, by proclamation, make leather current, or make a sixpence go for twenty shillings, or twenty shillings for sixpence, which, not to mention any thing of the project of farthings, or brass money, he that challenges such a prerogative, is a potential tyrant, for if he may make my twelve pence in my pocket but two pence, what property hath any man in any thing that he enjoys*."

All these instances, it is observable, preceded the *Bill of Rights*, which ought now to be considered, as expressing the law on this subject. It must be owned, however, that in the resolutions of the House of Commons, relative to bullion, May 14th, 1811, the law, amongst other things, as laid down by Sir Matthew Hale, seems to have been adopted. On that occasion it was said, that the King might certainly alter the *denomination of money*, and so commit a fraud on his subjects if he chose, but he had no right whatever *to mix the coin with any alloy*, beyond that fixed by the legal standard; but this, as it seems to me, was too liberal a concession. It is hardly necessary to observe, that a resolution of the House of Commons has not the force of a law.

"Abstract Liberty," says Mr. Burke, "like other mere abstractions, is not to be found. Liberty inheres in some sensible object, and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness. It happened that the great contests for freedom in this country, were, from the earliest times, chiefly upon the question of taxing. Most of the contests in the ancient commonwealths, turned primarily on the right of election of magistrates, or on the balance amongst the several orders of the state.

* Vide 4 vol. State Trials, edited by Howell, p. 1029.

The question of money was not with them so immediate. But in England it was otherwise. On this point of taxes, the ablest pens and most eloquent tongues have been exercised, the greatest spirits have acted and suffered. In order to give the fullest satisfaction concerning the importance of this point, it was not only necessary for those who in argument defended the excellence of the English constitution to insist on this privilege of granting money, as a dry point of fact, and to prove that the right had been acknowledged in ancient parchments and blind usages to reside in a certain body, called a House of Commons. They went much farther, they attempted to prove, and they succeeded, that in theory it ought to be so, from the particular nature of a House of Commons, as an immediate representative of the people; whether the old records had delivered this oracle or not. They took infinite pains to inculcate, as a fundamental principle, that in all monarchies the people must in effect themselves mediately or immediately possess the power of granting their own money, or no shadow of liberty could subsist*."

In the times of the *Saxon kings*, it seems, this privilege of the Commons to originate taxes was enjoyed as much as the unsettled condition of those times would allow. At the *Norman Conquest*, or soon after, it was, *in practice*, invaded and almost wholly lost; but in theory it was acknowledged.

In one of the laws of William the Conqueror, (*Leg G.* 1, *55*,) there is an express declaration, "That all the freemen in his kingdom, should hold and enjoy their lands and possessions free from all unjust exactions, and from all tallage; *(libere ab omni exactione injusta, et ab omni tallagis.")* So that nothing should be exacted or taken of them but their free service, which they by right owed to the crown, and were bound to perform." And it is thereby expressed, "That this was ordained, and granted as an hereditary right for ever, *(datum et concessum jure hæreditario in perpetuum,) by the Common Council of the kingdom (per commune consilium totius regni nostri prædicti.)*

* 2 Vol. Burke's Works, p. 39.

This Statute *Nat. Bacon* justly terms the first Magna Charta in the Norman times*.

In the reigns of *Rufus* and of *Henry I.* and *Henry II.* taxes appear to have been very arbitrarily levied†. In the reign, however, of *King John*, the right was again insisted upon by the oppressed and murmuring people, and was happily re-established by the 12th article of the *Great Charter* (A. D. 1215.) This charter was confirmed by Henry III. in the ninth year of his reign; but afterwards, in the eleventh or twelfth year of his reign, he cancelled the charter, and daringly trampled upon the right it was intended to secure. *Edward I.* for a time, pursued the same ungracious course, but the worried nobles and people at length asserted their injured rights, and obtained from this same Edward, the famous Statute *De Tallagio non Concedendo*‡, which in strong positive terms established the right of the subject not to be taxed, unless it was in Parliament§. The words of the Statute are, "NO TALLAGE OR AID SHALL BE TAKEN OR LEVIED BY US, OR OUR HEIRS IN OUR REALM, WITHOUT THE GOOD WILL AND ASSENT OF OUR ARCHBISHOPS, BISHOPS, EARLS, BARONS, KNIGHTS, BURGESSES, AND OTHER FREEMEN OF THE LAND."

It is observable, that *Hakewell* says of this Statute, that, "touching *the time* of making it, there is a great variety of opinion, *for it is not, for ought I could learn, found any where upon record,*" but it appears there is an existing record of this Statute‖.

The language of the constitution on the subject of taxes, is well expressed, in a conference of the Commons with the Lords in 1689, on some alterations proposed by the latter, in the *Poll Bill*¶.

* Vid. 1 vol. Lyttleton's History, p. 60, and the Appen. No. 11, p. 464, Nat. Bacon's Disc. 1st part, p. 76.

† 1 Vol. Parliamentary History, p. 9, 16.

‡ See 25 Edward I. c. 1, and not 34 Edward I. as generally cited. Vide the first part of the magnificent edition of the *Statutes of the Realm*, lately published in folio, p. 125, in note. The public eye ought to be directed to this important work.

§ 2 Inst. 5,432. ‖ See *Statutes of the Realm*, p. 25, fol. edit.

¶ 10 Vol. Journals, p. 134.

Edward the Second never levied taxes, without the consent of Parliament; but in the reign of Edward III. that prince endeavoured, by various pretences, to impose on the people the hard yoke of impositions without the assent of Parliament—sometimes by increasing the customs—sometimes by dispensing with statutes—sometimes by imposition for tonnage—sometimes by endeavouring to raise money without the assent of the Commons in Parliament, by way of *ordinance*, i. e. by the King and Lords, without the Commons; and sometimes, by directly making impositions without any colour of authority; all which proceedings are particularly observed upon by *Hakewell*, in his admirable speech on *Impositions*, and are noticed in *Cotton's* Abridgment of the Records. But all these devices were seen through, and remonstrated against, and *Lord Latimer*, the King's Chamberlain, was on this account, fined and imprisoned. Notwithstanding the endeavours and claims of *Edward III.* the people still continued to insist, in Parliament, upon their rights, and refused to be charged with any imposition or subsidy, except by their own consent in Parliament; and this they did with such effect, that in the *29th Edward III.* the Parliament granted the King a subsidy, to be continued for six years, but on this express condition, *that no other imposition or charge, should, during that time, be levied on the Commons**; so that Hume† seems not correct in his supposition, that the famous act *De Tallagio non Concedendo*, had lost all its authority. Indeed, the right of taxation was so clearly settled, that very little, if any thing, of undue exaction was practised by the succeeding kings, for near two hundred years. In the reigns of *Richard II.* and *Henry IV. V. and VI.* the right of the people to tax themselves in Parliament, was continually asserted and acknowledged. It was in the reign of this last monarch, that his chancellor *Fortescue*, thus expressed himself, a King of England "can neither make any alteration or change in the laws of the realm, without the consent of the subject, nor burthen them against their wills, with unusual impositions, so that a people, governed by such laws as are made by their own consent and approbation, enjoy

* Rot. Parl. 2 vol. p. 265. † 2 Vol. History, p. 491.

their properties securely*. *Edward IV.* had recourse to what were termed *benevolences*, which was in reality, if I may use the expression, a *forced gift*, and in truth, a compulsive tax, or a *malevolence*, as it was called. This exaction is noticed by *Sir Edward Coke*, 12 Rep. 119, &c. and he gives a curious anecdote on the subject. In the first year of the reign of *Richard III. benevolences* were declared an unlawful invention, and, to use the words of the Statute, were "damned and annulled for ever," but they were revived by *Henry VIII*†. In this latter reign, a strong tide set in against the exclusive right of Parliament to tax. *Loans, free gifts*, and *benevolences* were resorted to, and other undue means, which raised a great ferment in the nation‡. *Queen Mary*, by her own authority, laid impositions, which during her life were submitted to and paid, without contradiction! Impositions also, though of a different nature, were levied by *Queen Elizabeth*, and without remonstrance! Similar impositions were continued by *James I.* He moreover, claimed the right of imposing duties, *on imported and exported merchandize*, by prerogative, and in *Bates's* case, the judges sanctioned the claim§. But the most express and avowed claim of a prerogative right, to tax the subject, was in the reign of *Charles I.* who, stimulated by the Duke of Buckingham, insisted that *tonnage* and *poundage* were due to the crown, by hereditary right, without any grant from the subject; and also that he could justly, by his own authority, not only make impositions upon merchandizes, but also, that in cases of danger, of which he was the sole judge, could oblige the *maritime* and even the *inland* counties, to find a proper number of ships for the defence of the seas, or levy the sums of money upon them that should be requisite for that purpose; as to all which points, to their shame be it said, the King obtained the sanction of most of the judges! Even *Bacon* and *Sir John Davis* prostituted their great abilities in support of these claims. *Charles I.* also, without authority, imposed *coat* and *conduct* money. In opposition to these unwarrant-

* Fortescue *De Laudibus legum Angliæ*, c. 9.

‡ Stow's Annals, 17 Henry VIII. † Herbert's History, A.D. 1526.

§ See this great case in 11th vol. State Trials, p. 30, Harg. edit.

able practices, the House of Commons made strong remonstrances, founded upon evident and ancient facts. They demonstrated, that tonnage and poundage, and even the customs, had been originally granted by Parliament; first, for a time, and afterwards, for the life of the Prince. Sir Robert Cotton, expressly says, that tonnage and poundage began 45th *Edward III.* (he should have said, I believe, 47 *Edward III. n.* 12*,) and had their original in Parliament†. All the greatest lawyers were of opinion, that no *custom* was due to the King by *common law*‡. As to *ship money*, it was argued, that though a *similar tax* had been once or twice demanded formerly, yet the nation never submitted to it. For when *Henry IV.* in the second year of his reign, ordered boats and ballengers to be provided at the expense of the towns, it was complained of in Parliament§. The objections to the claim of ship money were so irresistible, that Charles the First, in his answer to the *Petition of Right*, (3 Car. 1.) found himself bound to acknowledge, that the Crown had no right to levy any money by *loans, benevolences, taxes*, or *otherwise*, without common consent by Act of Parliament.

In 1671, great disputes arose as to the *exclusive right*, claimed by the Commons, of originating grants of money, and the *Attorney-General Finch*, (afterwards *Earl of Nottingham*,) had the thanks of the House of Commons voted to him, for his able support of that inestimable privilege. He undeniably proved an uninterrupted possession of this privilege ever since 9 *Henry IV.* confirmed by a multitude of precedents both before and after, not shaken by one precedent for the preceding 300 years‖. In the memorable conference with the Lords on the subject, Mr. Finch observed, in the course of his speech, "Your Lordships proceed to demand, where is that record or contract in Parliament to be found, where the Lords appropriate this right to the Commons, in exclusion of themselves?" Answer. To this rhetorical

* Vid. 2 vol. Rot. Parl. 317. † Posthu. p. 172. ‡ 2d Inst. p. 59.

§ See the Arguments in Hampden's case, in the State Trials.

‖ Vid. Com. Journal, 9 vol. 243.

question, the Commons pray, they may answer by another question: Where is the record or contract by which the Commons submitted that *judicature* should be appropriated to the *Lords*, in exclusion of themselves? Wherever your Lordships find the last record, they will shew the first indorsed on the back of the same roll. *Truth is, precedents there are, where both sides do exercise those several rights; but none, how either side came by them**."

In 1692, 3, when a money bill was sent up to the House of Lords, the *Lords Halifax, Mulgrave*, and others, endeavoured, with all their eloquence, to engraft a clause upon it, "That the Lords should tax themselves;" but when it was returned to the Commons, it was with one voice rejected, and with peculiar tokens of indignation. The Commons, that the Lords might not fancy the subject required a moment's hesitation, instantly demanded a conference with the Lords. No sooner had the Lords sent down the bill, than they proceeded on Lord Banbury's claim. After occasioning much heat, the Lords retreated, and the House of Commons triumphed in its well-merited victory.

The history of several countries, formerly free, furnishes us with many fatal proofs, that when the people have, by ill-placed confidence, transferred the legislative authority of raising money, from themselves into the hands of a few, their ruin ensues. The *Cortes of Spain*, by trusting the power of raising money, without their being assembled, though but for one year, and the *Estates of France*, by allowing the aids for the defence of the kingdom to be raised for three or four years together, without their being summoned to meet, were never able to retrieve their ancient liberties and constitutions; but by their weak compliance in such a fatal measure, became the unhappy instruments of rendering themselves useless, and of enslaving their respective countries.

This great fundamental privilege therefore, of the House of Commons, of raising money, can never be too highly prized, or too anxiously guarded. King James II. after all the assertions of the people's

* Com. Journal, 19 vol. p. 243.

rights here enumerated, took the customs and chimney money, as we have before observed, from the beginning of his reign, for a considerable time, without any act of parliament to authorise it, and that daring violation of a fundamental doctrine of the constitution, excited of course, great attention, and gave occasion to the provision in the Bill of Rights, on which I have been commenting.

It has been held, that the people have a right to offer and give, and the crown has a right to receive, a subscription for public purposes, without the knowledge and consent of Parliament*.

The guarded appropriation of money grants, perfected, if not introduced, at the Revolution, has greatly enhanced the value of the rights of the Commons, relative to taxes.

It is difficult to be brief, and yet explicit on this noble subject. It is not consistent with the nature of this comment, to treat the subject more at length; though certainly no subject is of more constitutional importance, or better calculated to excite, and reward curiosity. It deserves a volume, instead of a note.

The whole doctrine, as to taxes, cannot be more comprehensively summed up, than it is in the reasons given by the House of Commons for disagreeing with the Lords in the amendment to the Poll Bill, in 1689. "All money aids and taxes, to be raised or charged upon the subjects in Parliament, are the gift and grant of the Commons in Parliament, and presented by the Commons in Parliament; and are, and always have been, and ought to be, by the constitution and ancient course and laws of Parliament, and by the ancient and undoubted rights of the Commons of England, the sole and entire gift, grant and present of the Commons in Parliament; and to be laid, rated, raised, collected, paid, levied and returned for the public service, and use of the government, as the Commons shall direct, limit, appoint, and modify the same: and the Lords are not to alter such gift, grant, limitation, appointment or modification of the Commons, in any part

* Vid. Debret's Parliamentary Register, for 28th March, 1794. See also 13 Car. 2, c. 4, s. 5, and 12 Rep. 120; Senator, 10 vol. p. 782; and see St. John's Case, State Trials.

or circumstance; or otherwise to interpose in such bills, than to pass or reject the same for the whole, without any alteration or amendment, though in ease of the subjects: as the King and Queen, by the constitution and laws of Parliament, are to take all, or leave all, in such gifts, grants, and presents from the Commons; and cannot take part and leave part: so are the Lords to pass all, or reject all, without diminution or alteration*."

" 5. *That it is the right of the Subject to petition the King,* " *and all Commitments and Prosecutions for such petitioning,* " *are illegal.*"

COMMENT.

The particular grievance that led to this Declaration, has before been noticed.

The right of complaining to the throne, without the danger of punishment, thus declared and secured to the subject, is of great value. The right, indeed, had often before been acknowledged. *Lord Chief Justice Hobart* expressly says, " It is lawful for any subject to petition the King for redress in an humble manner; for access to the sovereign must not be shut up in case of the subject's distress†. One of the articles against *Lord Strafford* was, that he issued out a proclamation and warrant of restraint, to inhibit the King's subjects to come to the fountain, their sovereign, to deliver their complaints of wrongs and oppressions‡. *Henry VIII.* told his subjects, when in arms against him in Yorkshire, that they ought not to have rebelled, but to have applied themselves to him by petition§. It was said, even in the *Star Chamber Court*, " This Court hath no intent to discourage the meanest subject of his lawful appeal to his Prince, for that were to disinherit the people of law, and the King of the intelligence of the

* 10 Vol. Journals, p. 134. † Wrexham's Case, Hob. Rep.

‡ See Rushworth.

§ Burnet's History of Reformation, 1 vol. p. 231.

oppression that might fall upon his people*." *Holloway, Justice*, on the great trial of the seven bishops, says, "It is the birth right of the subject to petition." With a view to prevent such riots, as occurred on the opening of the memorable parliament in 1640, it was provided by the Statute 13 Car. 2, c. 5, that no petition to the King, or either Houses of Parliament, for any alterations of matters established by law, in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, at the assizes or quarter sessions; and in London, by the Lord Mayor, Aldermen, and Common Council, nor shall any petition be presented by more than ten persons at a time. Concerning this Statute, it is observable, First, That it allows, that by the law of the land before, it was the settled and undoubted right of the subjects of England, to apply themselves to the King, or either or both Houses of Parliament, by petition, to have their grievances redressed. Secondly, That where it limits this power of the subject, and requires that the petition shall be consented to, and ordered by three or more justices of the county, or by the major part of the grand jury of the county, or division of the county, where the same matter shall arise, or by the Lord Mayor, Aldermen, or Commons in Common Council assembled, if it arise in London; it is only in a particular case, where the address is, *for alteration of matters established by law in Church or State.* Thirdly, That even in this case, the concurrence of those persons is not required, unless it be, where there are more than twenty hands to the petition. Fourthly, That the Act extends not to grievances or complaints, either public or private, but that they may be presented to the King or Parliament, without any of those previous formalities, provided that the petition or address be not presented by more than ten.

In an excellent tract, intitled, "*Faction Detected*," p. 150, the *Earl of Egmont* contended, that the *Bill of Rights* had virtually repealed

* See the Case of Wraynham, noticed in Rawley's Life of Bacon, p. 117.

† See Serjeant Levinz's Speech on the Trial of the Seven Bishops, State Trials.

the 13 Charles II. c. 5, and his opinion has the sanction of *Mr. Dunning**, and of the editors of Co. Litt.† ; but upon the trial of *Lord George Gordon*, it was declared by *Lord Mansfield*, that it was *the joint and clear opinion of the whole Court*, that this Statute was not in any degree affected by the Bill of Rights‡.

One *Francis Jenks*, in 1676, moved in Guildhall, to petition the King for a new Parliament, and for this he was committed to prison by the Privy Council, where he was kept two months, owing to the delays made by the several judges, to whom he applied to grant him a *Habeas Corpus ;* and it was the oppression of this obscure individual, that gave rise to the famous *Habeas Corpus* Act.

The reader will find much learning on the subject of *Petitions*, in the 3d vol. State Trials, Harg. edit. p. 567.—4 vol. p. 367.—7 vol. p. 481. In the 5th vol. of the same work, p. 431 ; the question whether private subjects have a right to petition the King or the Parliament is considered.

" 6. *That the raising or keeping a Standing Army, within the* " *kingdom, in time of Peace, unless it be with the consent of* " *Parliament, is against law.*"

COMMENT.

It is observable, that what was said in the *Declaration of Rights.* (*ante*, p. 280) relative to " *the illegal quartering of soldiers,*" is not here adverted to. It is also observable, that this clause in the Bill of Rights, does not mention, and has been supposed not to extend to, *Marines.*

The truth of the assertion in the Bill of Rights cannot be questioned. " The laws and constitutions of these kingdoms," say Blackstone, "know no such state as that of a *perpetually standing soldier*, bred up to no

* New Annual Register for 1781. † Vid. Co. Litt. p. 257, n. 1.

‡ Vid. *King* against *Lord George Gordon*, Doug. p. 590, octavo edit.

other profession than that of war*." By the *common law*, the King could not, except in cases of *invasion*, or *insurrection*, levy or keep on foot any standing forces; nor by the common law, were the owners of private houses, inns or ale-houses, compellable to quarter soldiers against their will. In the *Saxon* times, the military force was not in the hands of the crown, but of leaders chosen by the people; but this salutary institution was supplanted by the *feudal* doctrine.

In all the *feudal* governments, the King had a right to summon, at pleasure, his vassals into the field, where they were obliged, for a limitted time, usually forty days, to serve him at their own expense; and a most powerful force it was. As a consequence of the tenure by *knights service*, the King had always ready at his command, to resist invasion, or quell insurrection, an army of 60,000 knights†."

In the reign, however, of *Henry II.* personal service was dispensed with, by pecuniary commutation; so that though military tenures were not abolished till the 12 Ch. II. c. 24; yet the personal service of the knights had, long before, fallen into disuse.

In the time of Richard II. an army of archers was assembled to the amount of 4000, and according to *Walsingham*, strangely composed, (*multos malefactores*, he describes them;) and it appears they over-awed the parliament, "*Sagittariis innumerabilibus vallato:*" such were the enormities they committed, with the countenance of the King, that it formed one of the charges (Art. 5.) against him‡. From this time to the reign of Charles I. no standing army was in being. It was the *militia* that sustained the holy war, and so successfully penetrated into France: In all the wars between the houses of *York* and *Lancaster*, whoever prevailed, no standing army was established.

Henry VII. raised no small jealousy by his 100 yeomen of the guard, augmented to 150, which constituted the whole standing army of his time. It was not till his time, that the Kings of England had even a guard to protect their persons. *A regimented militia* was established,

* 1 Black. Com. p. 408. † 4 Black. Com. p. 419.

‡ Walsingham, p. 354, Decem. Script. Coll. 2748, Stow, p. 316.

in the reign of Elizabeth, but she never dreamed of a standing army. When the *Duke of Alanson* came over to England, and for some time had admired the riches of the city, the conduct of Elizabeth's government, and the magnificence of her court, he asked her amidst such splendour, *where were her guards?* which question she resolved, a few days after, as she took him in her coach through the city, when pointing to the people, (who received her in crowds, with repeated acclamations,) *These*, said she, *my Lord, are my guards; these have their hands, their hearts, and their purses, always ready at my command:* and these were guards indeed, who defended her through a long and successful reign of 44 years against all the machinations of Rome, the power of Spain, a disputed title, and the perpetual conspiracies of her own Popish subjects; a security the Roman emperors could not boast of with their Prætorian bands, and their eastern and western armies *. Neither James the First, nor Charles the First, before the commencement of the civil war, had any considerably body of troops.

In 1628, the House of Commons remonstrated against an army in time of peace, and against *Buckingham*'s standing commission as General. At the conclusion of the civil war, the ruling party found itself at the head of a large and well disciplined army, and a great part of these troops, were afterwards maintained by *Cromwell*, for the support of his government. His army amounted to 20,000 foot, and ten thousand horse †. The disbanding of *Cromwell*'s army was, by *Clarendon*'s advice, one of the first acts of the reign of *Charles II.* but he kept up about 5,000 regular troops, merely by his own authority, for guards to garrisons. Exclusive of these instances, the English were unacquainted with standing armies, and were not accustomed to consider a discretionary power of raising or maintaining a military force, in that shape, as a branch of the prerogative. The few instances, besides, in which the Sovereign or Chief Magistrate, had exercised this power were such, as clearly to

* Vid. Trenchard on Standing Armies, p. 27.

† Parl. Hist. 20 vol. 258.

demonstrate its pernicious tendency, and to point out the utility of subjecting in this particular, the authority of the crown, at least in time of peace, to the control of the legislature*. *James II.* as before observed, increased the army, by degrees, to 30,000, all paid from his own Civil List; but this was illegal, and as hath been truly said, "it was a riot and unlawful assembly, every hour it stood." Had they been ill disposed, the revolution in 1688 could not, I imagine, have been effected, or if accomplished, not without a melancholy slaughter. This led to the provision of the Bill of Rights. Ever since the Revolution, it has been annually judged necessary by the Legislature, "for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and *the preservation of the balance of power in Europe*," (such is the language even of the last *Mutiny Act*, 51 Geo. 3.) to maintain, even in time of peace a standing body of troops under the command of the crown, who are however *ipso facto* disbanded at the expiration of every year, unless continued by Parliament. What would the framers of the Bill of Rights and of the first *Mutiny Act*, (for they were the same persons,) have said, had they been told that instead of 10,000 troops, which, with some murmuring, were established after the peace of Ryswick, in 1697, that England, in 1811, would raise an army in the United Kingdom to the amount of 84,801 men †. Yet Montesquieu has said that the preservation of England's liberties require that it should have neither strong holds, nor fortresses, *nor land forces!* Immediately after the peace of *Ryswick*, great discussions took place, relative to the disbanding of the army. The danger of a standing army was the universal theme. *Lord Keeper Somers*, upon that occasion, published his sentiments, in a tract, intitled "*A Letter balancing the Necessity of keeping a Land Force in Times of Peace, with the Dangers that may follow on it.*" This publication brought upon him, considerable invective, as he probably expected it would; but he was not to

* Vid. 2 vol. Bib. Polit. 638. 1 Black. Com. 412. Millar's Hist. 3 vol. p. 459, 460.

† Spirit of Laws, book 19, chap. 27.

be daunted by a little temporary unpopularity, when he had the public service in view. The particulars of the ill treatment he received on this occasion will be mentioned when I come to consider *(sub anno* 1697) the peace of Ryswick. Certainly, the censure was wholly undeserved. His opinion, in substance, was, that treaties were insecure, and that a good force was the best guarrantee of a peace, but that this force should be moderate, and kept up only from year to year. "Parliament," says he, "will, once a year, have this matter under its consideration, and will see how the state of affairs varies either at home or abroad, and whether the forces are brought under such a management, that there is just cause of jealousy." Our fleets, he thought, could not always secure us from invasion, and that a militia were not sufficient, (since war had become so much a science,) to cope with regular troops. These arguments were successfully urged at the time, and have ever since prevailed. *Adam Smith*, with reason, attributes the fall of the Greek republics, and of the Persian empire, and of Carthage, to the weakness of a militia, opposed by a standing army *. To keep this standing army in order, or rather *annual* army, (as it should more properly be termed,) the *Mutiny Act* is annually past to punish mutiny and desertion, and for the better payment of the army and their quarters. These acts regulate the manner in which the soldiers are to be dispersed among the several innkeepers and victuallers throughout the kingdom, and establish *a sort of law martial*, for their government. I say, a *sort* of law martial, because, according to the opinion of the late *Lord Rosslyn*, martial law, such as it is described by *Hale* and by Mr. *Justice Blackstone*†, does not exist in England." Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised,

* Wealth of Nations, 3 vol. p. 61. † 1 Vol. Com. p. 414.

claims a jurisdiction *over all military persons, in all circumstances* *." So, amongst the *Romans*, martial law affected all military persons, in all circumstances, as appears from *Juvenal* †; and the Satyrist seems to give it the preference, to the slow justice of the Prætors.

The mutiny acts, however, seem, without any qualification, to assert that martial law exists in England. The preamble to the last Mutiny Act is as follow: "Whereas the raising or keeping a standing army within the united kingdom of Great Britain and Ireland, in time of peace, unless it be with the consent of Parliament, is against law. And whereas it is judged necessary by his Majesty, and this present Parliament, that a body of forces should be continued for the safety of the united kingdom, the defence of the possessions of his Majesty's crown, and the preservation of the balance of power in Europe; and that the whole number of such forces should consist of 84,801 effective men: and whereas during the late war, in which his Majesty has been engaged, some part of his Majesty's forces, exceeding the number aforesaid, has been employed in distant parts beyond the seas, which must render the time when such forces may return home uncertain, some of which are intended to be broken, and others reduced as soon after such arrival as conveniently may be. And whereas no man can be forejudged of life, or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm; yet, nevertheless, it being requisite for the retaining all the beforementioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or shall desert his Majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow; be it therefore enacted, &c." These acts, it seems, though passed in time of war, are framed according to a precedent, first used in times of peace. A large army is absolutely necessary in the present state of European affairs, but the vast influence it adds to the crown,

* See the case of Grant v. Sir Ch. Gould, 2 H. Black. 99.

† 14 Sat. 2. 40 to 50.

and the great expense it occasions the subject, ought to be considered; and always should it be remembered, that Mr. Hume pronounces our army to be "*a mortal distemper in the British Constitution, of which it must inevitably perish* *."

"7. *That the Subjects which are Protestants may have Arms, "for their defence suitable to their conditions, and as allowed by "Law.*"

COMMENT.

"*Subjects which are Protestants*," &c. This seems, by implication, to assert, that persons, not Protestants, of whatever description they may be, are not entitled to have arms. In the *Declaration of Rights* (see *ante*, p. 283.) it was said that Papists had been armed contrary to law, but nothing is said in the declaratory part of the Bill of Rights, except by implication, as to the illegality of Papists being armed. By the 1 *William and Mary*, c. 15, provision was made, for disarming Papists, and reputed Papists.

"*As allowed by Law*," &c. By the ancient laws of England, from *Ina* to *Edward the Confessor*, it appears, that all estates, goods, and possessions, of what kind soever, capacitated the owners to keep arms †. In those early times, the capacity to keep arms, was attached to property, for our ancestors seem to have thought that it was not quite safe to put arms into the hands of men, who had no property to lose or defend.

Blackstone, alluding to this part of the Bill of Rights, uses very remarkable language, "It is," says he, "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression‡." By 33 *Henry VIII.* c. 9. the whole nation, except the judges, the clergy, and foreigners, were bound to possess, and exercise themselves in the *long-bow*, the arms then in use.

* Hume's Essays. † Vid. Tyrell's Gen. Introduction, p. 77.

‡ 1 Vol. Commentaries, p. 144.

As the subject is liable to the call of the sheriff, for the execution of process, and the suppression of riots and insurrections, he is, therefore, by law, supposed to be in the possession of arms, and capable of effectually using them.

Sir Edward Coke, in his *3d Institute*, ch. 73, enters into the doctrine on the subject of arms. See also a tract by *Sir W. Jones*, intitled, "*Legal Mode of Suppressing Riots*," in which the law relative to the keeping of arms is enlarged upon, and in which he convincingly proves, that the common and statute laws of the realm, give the *civil* state in every county a power, which, if it were perfectly understood and continually prepared, would effectually quell any riot or insurrection, without assistance from the *military*, and even without the modern Riot Act *.

In the celebrated trial of the *Dean of St. Asaph* †, and also on *Hardy's trial* ‡, *Mr.* (now *Lord) Erskine*, alluding to the mention of arms in the Bill of Rights, asserted, with his usual correctness and force, the subject's right to the possession of them.

"8. *That Elections of Members of Parliament ought to be "free."*

COMMENT.

See what Mr. Somers said relative to freedom of election, *ante*, 49.

Many writers have complained that the Bill of Rights was not more full and remedial upon this important subject. Its importance cannot be denied, but as I have before observed, the principle upon which the Bill of Rights was framed, precluded Mr. Somers introducing into it any *new law* on this subject; and the reasons, I have before given for his conduct, must, I think, be satisfactory.

The following words, in King William's Declaration, published

* Sir W. Jones's Works, 6 vol. p. 687.

† 1 Vol. Erskine's Speeches, p. 180.

‡ 3 Vol. Erskine's Speeches, p. 475.

upon his landing in England, relate to this subject, and deserve to be remembered. "*According to the constitution of the English government and immemorial custom, all elections of Parliament-men ought to be made with an entire liberty, without any sort of force, or the requiring the electors to choose such persons as shall be named to them; and the persons thus freely elected ought to give their opinions freely upon all matters that are brought before them, having the good of the nation ever before their eyes, and following in all things the dictates of their conscience**." Amongst the grievances reported by a committee of the Convention Parliament, as necessary to be remedied, one article related to this subject.

"8. *The right and freedom of electing members of the House of* "*Commons*, and the rights and privileges of Parliament, and members "of Parliament, as well in the intervals of Parliament, as during their "sitting, to be preserved†."

By the 3 *Edward I.* c. 5, more commonly called *Westminster the First*, it was expressly enacted, "*That elections shall be free.*"

It has been supposed by Mr. Christian‡, that the legislature had only in view the elections of *sheriffs, coroners*, &c.; and he gives as a reason for his notion, that the House of Commons had not then an existence! That there are no *writs, extant*, for its election, previous to the 49 *Henry III.* is, I believe, correct; but that there was previously a House of Commons, or representative assembly, is, I think, most clearly proveable. The discussion of this great point, is, however, foreign to the subject under discussion, and I shall, therefore, only observe, that I have never yet seen a satisfactory answer to the following observation of *Lambard*, in his *Archeion*, a work first published in 1635. "It is well knowne, that in every quarter of the realme, a great many of *burroughs* doe yet send burgesses to the Parliament, which is nevertheless so ancient and so long since decayed, and gone to nought, that

* See Commons Journal, vol. 10. p. 3. † Vid. *ante*, p. 227, in note.

‡ Vid. Christian's note to 1 Black. Com. p. 178.

it cannot be shewed that they have bin of any reputation, at any time since the Conquest, and much lesse that they have obtained the priviledge, by the grant of any King succeeding the same: so that the interest which they have in Parliament, groweth by an ancient usage before the Conquest, whereof they cannot shew any beginning; which thing is also confirmed by a contrary usage in the selfe-same thing; for it is likewise knowne, that they of ancient demeasne doe prescribe, in not sending to the Parliament; for which reason also, they are neither contributers to the wages of the knights there, neither are they bound by sundrie Acts of Parliament, though the same be generally penned, and doe make no exception of them. But there is no ancient demeasne, (saving that onely which is described in the booke of Domesday, under the title of *Terra Regis*,) which of necessitie, must be such, as eyther was in the hands of the Conqueror himself, who made the booke, or of Edward the Confessor, that was before him. And so againe, if they of ancient demeasnes have, ever since the Conquest, prescribed not to send burgesses to the Parliament; then (no doubt) there was a Parliament before the Conquest, to which they of other places did send their burgesses*."

To resume the point in question, Sir Edward Coke seems to have thought the Statute 3 *Edward I.* c. 5, extended to elections for Parliament, for he uses the following expressions: "This Statute doth enact, that no man upon grievous forfeiture, shall disturb any to make free election, and it is excellently penned in two respects; first, for that generally it extendeth to all elections, that is to say, to every dignity, office, or place elective, be it ecclesiasticall or temporall, of what kinde or quality soever. Secondly, the act is penned in the name of the King, viz. the King commandeth: and therefore the King bindeth himself, not to disturb any electors to make free election, as in the like case, upon a Statute made in the reigne of the said King; the act saying, *Rex perpendens*, &c. the same bound the King. Now that electors might make free and due elections without displeasure or fear

* Lambard's Archeion, pp. 257, 8, 9.

thereof, by this Act of Parliament, as a sure defence, the King commandeth the same upon grievous forfeiture; and this act extends to all elections, as well by those that, at the making of this act, had power to make them, as by those whose power was raised, or created since this act*.

In the important preamble to the 8 Geo. II. c. 30, there are the following words: "Whereas by the *antient common law* of this land, all elections ought to be free; and whereas, by an act passed in the *third year* of the reign of *King Edward I.* of famous memory, it is commanded upon great forfeiture, that no man, by force of arms, nor by malice, or menacing, shall disturb any to make free election. *And forasmuch as the freedom of elections of members to serve in Parliament, is of the utmost consequence to the preservation of the rights and liberties of the kingdom,*" &c. &c.

To preserve the freedom of elections, all soldiers must (except in some cases mentioned in the act) be removed from the place of the elections†; and riots, bribery, and the interference of *Lords of Parliament*, and officers of the *excise, customs,* &c. are denounced by the laws.

The language of the Bill of Rights only echoes, therefore, the voice of the common law, and the language of the Statute of West. 1st. By the 7 *Henry IV.* it is provided, that Knights of Shires for the Parliament shall be chosen, *libere et indifferenter sine prece aut præcepto.*

Adverting to the freedom of elections, Lord Mansfield once observed that, "*One of the principal foundations of the constitution depends on the proper exercise of this franchise; that the election of Members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote;*" and on this principle, the Court determined, that a *wager* between two voters, with respect to the event of an election of a member to serve in Parliament, laid before the poll began, was illegal‡.

* 2 Inst, p. 168. † 9 Geo. II. c. 30.

‡ Vid. *Allen* against *Hearn*, 1 T. R. p. 56.

"9. *That the freedom of speech, and debates or proceedings in* "*Parliament ought not to be impeached or questioned in any* "*court or place out of parliament.*

COMMENT.

Freedom of speech in Parliament, was probably exercised from the time parliaments were instituted. The first invasion on freedom of speech in Parliament, seems to have been in the memorable instance of *Robert Haxey*, in the reign of Richard II. but the judgment against him was annulled in the 1 Henry IV*. In the reign of Henry VIII. in the instance of *Strode*, a Statute passed†, in which freedom of speech was expressly accorded and acknowledged. It was enacted, that "all suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grants, charges or impositions, put or had, or hereafter to be put or had, into or upon the said *R. Strode*, and to every other person or persons afore specified in that Parliament, *or that of any Parliament that shall be*, for any bill, speaking, reasoning, or declaring of any matter concerning the Parliament, to be commenced and treated, shall be utterly void, and of none effect." On the 12th of November, 1667, the House of Commons resolved, that this act was a *general law*, and declaratory of the ancient and necessary rights and privileges of Parliament‡; and *Lord Ellenborough*, in the great case of *Burdett* against *Abbott*, observes, "I own, I agree with the cogent reasons given by *Sir Robert Atkins*, that this is to be considered as *a general act*, notwithstanding the opinion given to the contrary in the case of Mr. Holles, 3 Char. I.§" *Sir Edward Coke*, expressly says, that the 4 Henry VIII. c. 18, is, as to the latter branch of the act, general, and *declaratory* of the ancient law and custom of the Parliament‖. In Elizabeth's reign, freedom of speech was much violated. In 1593,

* Rot. Parl. Henry IV. No. 9. † 4 Henry VIII. c. 8.

‡ Com. Journ. 9 vol. p. 19. See also Lord's Journals of 11th Dec. 1807.

§ 14 vol. East. Reports, p. 143. ‖ 4 Inst. p. 9.

the Lord Keeper Puckering, in answer to the usual demands made by the Speaker, on his nomination, explained *liberty of speech*, to be no more, than a liberty of *aye* and *no**! The spirited *Wentworth*, and three other members were sent to prison, for proposing, in respectful terms, that the Queen should be entreated to settle the succession of the crown†!

The endeavours of James I. to invade liberty of speech, gave occasion to the famous *protestation* of the House of Commons, entered into the clerk's book, 18th December, 1621, penned by Sir Edward Coke, Mr. Noy, and Mr. Granville. It is an explicit assertion of the right to freedom of debate in Parliament, "The Commons now assembled in Parliament being justly occasioned thereunto, concerning sundry liberties, franchises, privileges, and jurisdictions of Parliament (amongst others herein not mentioned) do make this protestation following: That the liberties, franchises, privileges, and jurisdictions of Parliament, are the ancient and undoubted birth-right and inheritance of the subjects of England, and that the arduous and urgent affairs concerning the king, state, and defence of the realm, and of the Church of England, and the maintenance and making of laws, and the redressing of mischiefs and grievances, which daily happen in this realm, are proper subjects and matter of council and debate in Parliament, *and that in the handling and proceeding in those businesses, every member of the House of Parliament, hath, and of right ought to have freedom of speech to propound, treat, reason, and bring to conclusion the same.*

"And that the Commons in Parliament have like freedom and liberty to treat of those matters *in such order* as in their judgment shall seem fittest.

"And that every member of the said House has like freedom from all manner of impeachment, imprisonment and molestation (other than by the censure of the said House itself) for or concerning any bill,

* D'Ewes, p. 460, 469. † D'Ewes, 470.

speaking or declaring of any matter or matters touching the Parliament, or parliamentary businesses.

"And if any of the said members be complained of, or questioned for any thing done or said in Parliament, the same must be shewed to the king, by the advice and consent of all the Commons assembled in Parliament, before the King give credence to any private information*."

The offence this protestation gave to James I. is well known; he sent for the Commons Journal, tore the protestation out of the book, and declared the same invalid; but if he had all the *fury* of an oracle, he was without its inspiration. The law was, as stated in that protestation, and so it continues to be, nor had the king's violence any other effect, than to give additional celebrity to the protestation.

Charles I. backed by the judges of the King's Bench, made a formidable attack on the freedom of speech in Parliament, but it was the principal cause of all the calamities that ensued. There could hardly be a greater infringement on the liberty of speech in the House of Commons, than by the *information* brought in the King's Bench, *5 Charles I.* against *Sir John Elliot, Denzil, Holles,* and *Benjamin Valentine,* Esqrs. for words spoken in the House of Commons. They pleaded to the jurisdiction of the Court, as being a matter in Parliament, and therefore not punishable elsewhere; but judgment was given against them in the King's Bench, and great fines imposed upon them†.

In the Parliament which met in 1640, the House of Commons resolved, that the proceedings against these members, were against the law and privilege of Parliament, and condemned the authors and actors in them, as persons guilty of a breach of the privilege of Parlia-

* Vide Petyt, Jus Parliamentarium, p. 314, &c. where the whole subject is fully discussed. See also 1 Rushworth, p. 53; 5 Parliamentary History, p. 512; and 1 vol. Hatsel's Precedents, p. 78.

† See 7 vol. State Trials, p. 242, Harg. edit. and see 6 Hume, p. 276.

ment*, and the Lords agreed with the Commons in their vote, and the judgment was reversed†.

It is said in the Bill of Rights, that parliamentary proceedings "*ought not to be impeached or questioned in any Court or place out of parliament*;" and this article in the Bill of Rights extends, it seems, to actions or indictments brought, or prosecutions by *individuals*, as well as to informations or other proceedings directly instituted by authority of *the crown*‡. This article of the Bill of Rights cannot be fairly construed to entrench upon the unquestionable right which the people have to discuss, with decency, the sentiments of parliamentary speakers. Although a Member of either House is not accountable for his speeches in Parliament, even if they libel individuals; yet, if the member *publishes* a libellous speech, (in a newspaper for instance,) he subjects himself to an action. An action of that kind, if I remember right, was brought by *Mr. Sermon*, an attorney, against the late *Lord Abingdon*. But where a *report* was made by the House of Commons, in its collective capacity, which report reflected on individuals, it was held, that a publisher of a true copy of such report, was not subject to an information for a libel§.

There is great justness in the following remark of a very eminent judge: "All men may, nay, all men must, if they possess the faculty of thinking, reason upon every thing which sufficiently interests them to become objects of their attention, and among the objects of the attention of free men, the principles of government, the constitution of particular governments, and above all, the constitution of the government under which they live, will naturally engage attention, and provoke speculation. The power of communication of thoughts and

* See the Commons Journal of 12th and 23d November, 1667, where the judgment is stigmatized as an illegal judgment.

† See Lords Journal for 11th December, 1667.

‡ Vid. what is said in the 1st report from the committee, on proceedings relative to Sir Francis Burdett in May, 1810.

§ Vid *Rex* v. *Wright*, 8 T. R. p. 298.

opinions, is the gift of God, and the freedom of it is the source of all science, the first fruits and the ultimate happiness of society: and therefore it seems to follow, that human laws ought not to interpose, nay cannot interpose, to prevent the communication of sentiments and opinions in voluntary assemblies of men; all which is true, with this single reservation, that those assemblies are to be so composed, and so conducted, as not to endanger the public peace and good order of the government under which they live*."

"10. *That excessive* BAIL *ought not to be required, nor excessive* FINES *imposed, nor cruel and unusual* PUNISHMENTS *inflicted.*"

COMMENT.

"*Excessive bail.*" The *Declaration* of Rights adverted only to bail in *criminal* cases, but the *Bill* of Rights, as above, speaks of bail generally, and without confining it to *criminal* cases. To refuse sufficient bail, in cases bailable by law, has often, before the passing of the Bill of Rights, been deemed illegal, and a high breach of the liberty of the subject.

By the *common law*, a man accused, or even indicted of high treason, or felony, was admitted to bail†; but after the Norman Conquest, the offences of treason and homicide, and indeed, almost all criminal cases, were held not to be bailable ‡. Innocent persons, unjustly imprisoned, were driven to their writs of *mainprize, de homine replegiando et odio et atia,* of which, a correct account is given in *Nat. Bacon's English Government,* 1st part, p. 168. But, notwithstanding this, many of our princes arbitrarily inprisoned their subjects; till at length, by the *Great Charter,* chap. 29. the personal liberty of the subject was, (as it was supposed,) amply secured. But succeeding monarchs, on many occa-

* Vid. Lord C. J. Eyre's Address to the Grand Jury, 2d Oct. 1794. 1 Vol. Hardy's Trial, p. 9, 10. Gurney's edit.

† 2 Inst. 189. ‡ Ib. 142. 186.

sions, slighted this part of *Magna Charta*, and various statutes, 3 Ed. I. c. 6, and the 5th, 25th, 28th, and 38th of Edward III. were passed, to give additional effect, in this respect, to the Great Charter. Notwithstanding all these statutes, the subject continued to be often captiously imprisoned, and in the reign of James I. and also in the beginning of the reign of Charles I. the judges held, that they could not upon a *Habeas Corpus*, either bail or deliver a prisoner, *though committed without any cause assigned*, in case he was committed by the special command of the *King*, or by the Lords of the *Privy Council* *.

Such doctrines justly alarmed the nation, and by the 16th *Charles I.* ch. 10. it was expressly enacted, That no person should be kept in custody in consequence of such imprisonments. By the *delays* of the judges, this important act was rendered of little avail, and on this account it was, that the 31st *Charles II.* cap. 2. usually called the *Habeas Corpus Act*, was passed, by which, the method of obtaining the writs of Habeas Corpus is plainly pointed out, and the speedy operation of it is secured. Truly does Mr. Fox term this statute "the most important barrier against tyranny, and best framed protection for the liberty of individuals, that has ever existed in any ancient or modern commonwealth †." "So long," says Blackstone, "as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires, and justifies such detainer." "And," he continues, "lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared in the Bill of Rights that *excessive bail* ought not to be required‡." If, indeed, *excessive bail* could be required, there would, at once, be an end of all these statutory safeguards of the personal liberty of the subject. What bail shall be considered as *excessive*, is left to the courts, on considering the circumstances of the case, to determine.

"*Excessive fines.*" I have before noticed some grievous instances of

* Vid. Treatises of the Nobility by Judge Dodridge, p. 159. Vid. also the case of Sir Thomas Darnell and others. 7 Vol. State Trials, p. 114, &c.

† Fox's Memoirs, p. 35, 6.

‡ 1 Vol. Black. Comment. p. 134.

enormous fines. In an important case in the time of Charles II.* *Lord Ch. J. North*, says, " In cases of *fines* for *criminal* matters, a man is to be fined by *Magna Charta*, with a *salvo contenemento suo ;* and no fine is to be imposed greater than he is able to pay; but in *civil actions*, the plaintiff is to recover by way of compensation for the damages he has sustained, and the *jury* are the proper judges thereof."

There is a difference laid down between a *fine* and an *amerciament*, which is not usually adverted to. A *fine* is always imposed and assessed by the *court*, but an *amerciament*, which is called in Latin *misericordia*, is assessed by the country †. Excessive amerciaments are against law, as is plain from *Magna Charta ; nullus liber homo amercietur, &c. nisi secundum quantitatem delicti." See also* 11 *Co.* 44. *Hume* truly says, " By the law of England, ratified in the Great Charter, no fines or damages ought to extend to the total ruin of a criminal‡."

" 11. *That Jurors ought to be duly impannelled and returned,* " *and Jurors which pass upon Men in Trials for High Treason,* " *ought to be Freeholders.*"

COMMENT.

On the trial of Lord Russell, his counsel, *Polexfen, Holt*, and *Ward*, contended,

1st. That at *common law*, a freehold was necessary to make a man a juryman.

2dly. That by the Stat. 2 *Hen. V.* c. 3. none shall be admitted to pass upon any inquest upon the trial of the death of a man, except he have lands and tenements of the yearly value of 40*s*.

3dly. That the words of this Stat. of Henry were general, and extended to London, (where Lord Russel was tried,) though a city and county,

* Lord Townshend against Dr. Hughes, 2 Mod. 151. Leach's edit.

† Co. p. 39. ‡ 8 Vol. Hume, p. 178.

as was plainly to be inferred from the provisions of several statutes, such as, 7 *Hen. VII. c.* 5,—4 *Hen. VIII. c.* 3,—23 *Hen. VIII. c.* 15,—and 33 *Hen. III. c.* 23.

In answer, it was contended, by the counsel for the crown,

1st. That at *common law*, it was not necessary for a juryman to be a freeholder, and that no book was cited to prove that it was necessary.

2dly. That the Stat. 2 *Henry V.* c. 3, made a freehold necessary, and that stat. proves it was not necessary by the common law; for if it was, the stat. was unnecessary; and this Stat. of the 2 *Hen. V.* was repealed by the Stat. of 1 and 2 *Philip and Mary*, chap. 10, which enacted, that all trials for treason shall be as at the common law.

3dly. That in various trials no such objection, for want of freehold in the jurors, had been taken.

On these grounds the judges were of opinion, that the jurors on Lord Russell's trial *need not be freeholders.*

It must be owned, I think, that the arguments of the King's counsel were the strongest upon this occasion; but the truth, I believe, will, on inquiry, be found to be, that the counsel for Lord Russell did not say all that might have been urged upon that occasion. The Lord Chief Justice put this question to Mr. Polexfen, "Do you find any *judgment* that in cases of *treason*, by *common law*, they might except for want of freehold? Have you any *resolution* in the case?" To this question Polexfen replied, "I *think* there are books that say, at *common law* there must be *freehold.*"—"What," (said the Lord Chief Justice,) "in *high treason?*" To which Polexfen replied, "*No, my Lord.*" It appears from the cases, that at *common law* it was not material of what yearly value the *freehold* was, but that *some* freehold (however small) was necessary for jurors to have, otherwise it was just cause of challenge. This seems to have been the general rule; and if there was any exception in cases of treason, the counsel for the crown, or the judges, should have pointed out on what grounds the exception was built. What *Ch. Baron Atkins* says, as to the necessity there was of a freehold by the common law, seems to me conclusive, and might have been urged, with great propriety, on Lord Russell's trial. The Chief

Baron observes, "The Stat. of 2 *Hen. V. c.* 3, first states the yearly value of the freehold, and required it should be of 40*s.* per annum.—And therefore the books and authorities that speak of freehold of a less value than 40*s.* per annum must, of necessity, be understood not to speak of cases within that statute, but of cases at the common law."

"3 *Hen. IV.* fol. 4. 6. Rolle's Abridgment, title Tryal, fol. 648. It is there held, *that freehold of any value was sufficient for a juror.* This proves that freehold is requisite, and that it was so before the Stat. of 2 *Hen. V.* it being in the reign of King Henry the Fifth's father: and with this agrees Kelloway, fol. 46.

"Some other cases after the time of King Henry the Fifth prove the same, as, 16 *Edw. IV. fol.* 8. half an acre of land, so it be within the hundred, says that book, is sufficient: and it is well known, that as to this qualification of having freehold, the same rule governs in the rest of the jurors as in those of the hundred *.

"Nor do these authorities distinguish at all between cases criminal and civil, nor, in cases criminal, between that of treason and in cases less criminal."—"This being so at the *common law*, and the Statute of the 2 *Hen. V.* c. 3. only adding the yearly value, viz. 40*s. per annum* freehold, which before, at the *common law*, might be of any lower value. Now, though that Statute of 2 Hen. V. be repealed, as to tryals in *treason*, as in truth it is by the latter Statute of 2 and 3 of *Philip and Mary*, cap. 10. which enacts, that all tryals in treason shall be according to the course of the *common law*, the result is, that still there must be freeholders to try, though they may be freeholders, as at the common law, of any yearly value whatsoever.

"That the Statute of 2 Hen. V. (while it was in force,) did extend to cases of treason (tho' treason was not expressly mentioned in it, and the statute speaks very ambiguously and obscurely,) appears by the authorities following, viz. *Stamford's* Pleas of the Crown, 161: and *Poulton de Pace Regis & Regni*, 187; and by the Statute of 33 *Hen. VIII.* c. 23, in the proviso that reserves to the party the challenge, for

* 10 Hen. VI. Brooke's Abridgment, Challenge, 192.—Hales's Pleas of the Crown, 260.

want of 40*s.* freehold, even in case of treason, though it make the treason triable in any county."

"See Sir *Christopher Blunt's Case, Justice Croke,* 37 Eliz. fol. 413. In an information of intrusion by the queen, a juror was challenged for want of freehold; and upon examination of the juror, it appeared he had freehold of 15*s. per annum* value, and that was adjudged sufficient; which admits it had been a good cause of challenge, had there been no freehold at all; and it necessarily implies, that it was required by the *common law,* for no statute interposed as to any lower value than forty shillings per annum. Nor does this case distinguish between the case of intrusion upon the queen, and any other case.

"But it may reasonably be argued, if freehold be necessary in a juror, who is to try a case of intrusion only, *a fortiori,* is it requisite in a case of high treason; but in that case of *Sir Christopher Blunt,* another juror was challenged that had no freehold, and he was therefore set aside.

"Now, that the challenge for want of freehold extends to the city of *London,* and other cities and boroughs, as well as to the counties, is abundantly proved by the Statutes of 11 Henry VI. c. 1; 7 Henry VII. c. 5, and 23 Henry VIII. c. 13; to which, says Atkins, the reader, for brevity sake, is referred *."

This part of the Bill of Rights has settled the question, and now, unquestionably, jurors, in cases of high treason, must be freeholders †.

* Vide Atkins's Parliamentary Tracts, p. 402, &c.

† In *Fitzharris*'s case, [3 vol. State Trials, p. 264, Harg. edit.] *Ch. J. Pemberton* seems to have thought some *freehold* necessary to qualify jurors in cases of trials for treason, though in *Lord Russell* and *Col. Sidney*'s cases, he ruled otherwise; yet a great judge of the present day has said, he cannot find fault with his direction in matters of law upon that trial! [See East's Rep. 14 vol. p. 106.] By 4 and 5 William and Mary, c. 14, it is required, that a juror must not only be a freeholder, but have within the same county, freehold or copyhold lands to the clear yearly value of ten pounds; and this has been held to extend to trials in *London* for high treason. [*Francia*'s case, 6 vol. State Trials, p. 58. Harg. edit. and Layer's case, ib. p. 246.] If a juror has no freehold, but only a copyhold

Hume, it is observable, in his account of Lord Russell's trial, takes no notice of the objection to the jurors, nor indeed does Mr. Fox, in his historical work. The objection relative to the jury was not the only grievance in the case of *Lord Russell*, as is plain from the preamble to the Act 1 *William and Mary*, No. 4, by which his attainder was annulled; for it recites, that, "By undue and illegal returns of jurors, and by having been refused his lawful challenge to the said jurors, for want of freehold, *and by partial and unjust constructions of law*, wrongfully convicted, attainted, and executed for high treason: May it therefore, &c." Yet an eminent modern judge has said, he finds no fault with the judge's direction in matters of law upon that trial * !

The bill to reverse the attainder of *Lord Russell* came to the House of Lords in paper, with the King's name in the margin, and recommendation of the bill, as is usual in cases of bills where the crown is concerned, as in bills for reversal of attainders, outlawry, or restitution in blood. It was received by the Commons without any recommendation, passed through that House, and had the royal assent as a *private bill*. The same proceeding was had in the case of the reversal of *Algernon Sidney*'s attainder †. One of the grounds for the annulling of his attainder, was the denial of his challenges to divers of the jurymen for want of freehold‡.

"12. *That all grants and promises of Fines and Forfeitures of "particular persons before conviction are illegal and void.*"

COMMENT.

The Bill of Rights was here, as in other respects, *declaratory* of the

of ten pound value, this is not a sufficient qualification; [Layer's case, 6 vol. State Trials, p. 246;] but any freehold is sufficient, if the juror has copyhold besides, and both together amount to ten pounds per annum. [See Townley's case, 9 vol. State Trials, p. 543, and Foster's Crown Law, p. 7.]

* See East's Rep. 14 vol. p. 106.

† 2 Vol. Hatsell's Precedents, p. 337.

‡ Vid. 1 William and Mary, No. 24.

old constitutional law. *Sir Edward Coke,* in his comment on the word *destruatur,* used in *Magna Charta,* 2 Inst. 48, says, "If any man be accused or indicted of treason or felony, his lands or goods cannot be *granted* to any, no not so much as by *promise,* nor any of his lands or goods seized into the King's hands, before attainder: for when a subject obtaineth a promise of the forfeiture, many times undue means and more violent prosecution is used for private lucre, tending to destruction, then the quiet and just proceeding of law would permit, and the party ought to live of his own until attainder."

The Statutes of the 8 *Henry VI.* c. 16, and the 18 *Henry VI.* c. 6, prohibit the granting to farm of lands seized into the King's hands upon inquest, before the escheators or commissioners, *until such inquest be returned in the chancery or exchequer, and for a month afterwards, if the King's title in the same be not found of record,* unless to the party grieved, who shall have tendered his traverse to such inquest *.

In *Capt. Kidd's case,* which made so much noise in the reign of King William, (and of which more must be said hereafter,) Lord Somers granted Kidd a commission under the great seal, in 1695, empowering him to apprehend some pirates on the coast of America; and a *grant* was also made to him for the benefit of the owners of the ship in which he was to sail, and to secure to Kidd one tenth part of what should be gotten for himself. It was argued, that the *Bill* of Rights prevented the King granting the goods of pirates before conviction; but in answer, it was contended, that the Bill of Rights did not extend to this case, the whole act relating only to the securing to the subject the benefit of the common law of *England,* and had no relation to cases which were of the conuzance of the *civil law,* as that of pirates was acknowledged to be. The words in the act, it was said, shewed the clause could relate only to such forfeitures *as arose by the conviction,* as common law forfeitures do, and not to such offences *where the fact*

* Vid. *Doe, Lessee of Hayne, and his Majesty, against Redfern,* 12 East. p. 96. which arose out of the Act of Henry VI.

itself *makes the forfeiture*, as it does by the law of nations in case of piracy; for though the pirate escape, or is slain in fight, or dies before his trial, yet he has forfeited his goods. It followed therefore, that since, by committing piracy, the offender has lost his right in the goods, it was no wrong to him that they were granted away; whereas, though a particular person be the most notorious felon, and ever so often guilty of the crime, yet his goods continue his own, till the conviction upon record give the King a title, and till that title the King has nothing in him to grant *.

"13. *And that for redress of all grievances, and for the amend-* "*ing, strengthening, and preserving of the laws, parliaments* "*ought to be held frequently.*"

COMMENT.

Among the grievances pointed out by the committee at the Revolution, and the reforms recommended, as stated *ante*, p. 227, 8, it was said, "That Parliament ought to sit frequently, and that their frequent sitting be secured." This language was explicit. It was also, at the same time, proposed by the 11th article, "That the too long continuance of the same Parliament be prevented." It would have been better if Mr. Somers had been more full and explicit in the wording of this article of the Bill of Rights. The obscure language of the Statute of the 4 *Edward III.* c. 14, and of the 36 *Edward III.* c. 10, was adopted instead of the more advisable precision of the Statute of the 16 *Charles II.* c. 1. But the doubts which thus arose, were afterwards removed by the Act of the 6 *William* and *Mary*, c. 2, which enacts, as the 16 *Charles II.* had done before, that a Parliament shall be holden once in three years at least, and that a new Parliament shall be called within three years after the determination of the former Parliament. By an act of the Long Parliament in 1640, it was enacted, That

* Vid. Account of the proceedings in relation to Capt. Kidd, printed in 1701.

a Parliament should be held, at least every three years, though the King should neglect to call it, in order to prevent the inconvenience arising from a too long intermission of Parliaments." And although the clauses in this act, compelling the sending out of writs, even without the King's consent, were thought to be an encroachment upon the prerogative, or, as Lord Clarendon says, "derogatory to Majesty, and letting the reins too loose to the people," and were accordingly repealed by the act of 16 Charles II. c. 1; yet the principle was retained, it being thereby enacted, "that the sitting and holding of Parliament shall not be intermitted for above three years *."

The act for *Septennial* Parliaments, (1 George I. st. 2, c. 38,) leaves the law as it was before that act, relative to the intermission of Parliaments †, and it will be found that the nation is not, *by law*, entitled to any more than one session of Parliament, and that, as short as the King pleases, once every three years. It is not likely, however, or indeed practicable, that Parliaments should be intermitted even for three years, since the revenue now arises principally from acts which are annual. The Mutiny Act too, and other important acts, are each of them annual; and as long as they, and in particular the supplies, are annually voted, annual parliaments are, as they ought to be, secured.

The meetings and duration of Parliament have been variously regulated. The *Wittenagemote* of the *Saxons* was held *annually* ‡. In the time of the Saxon King *Alfred*, it was ordained, that a Parliament, *twice a year, or oftener, if need were*, in time of peace, should assemble together at London, to speak their minds, &c. § This custom continued till long after the Conquest, and there seldom passed a year without a general council of the whole kingdom. Parliaments, it appears, did not then sit long, but frequently; for judges did not, in those days, decide difficult questions, but sent them into Parliament, and that it seems principally

* Vid. Hatsell's Precedents, and Wight on Parliament, p. 15.

† See some observations on the *Septennial* Act, and a curious anecdote relating to Lord Somers, *post*. 2d part.

‡ Spelm. Gloss. de Gemotis Anglo Saxonum. § Mirror, c. 1. s. 3.

occasioned the calling of Parliaments so frequently. As *Lord Ellesmere* observes *, "in antient times, where the matter was against reason, and the party had no remedy at law, it was the use to sue for remedy in Parliament, and the Parliaments were holden, on course, twice every year; but now," says he, "suits are in chancery, and the Parliaments are not so often holden."

According to an ordinance, mentioned as passed, in the 5 Edward II. c. 29, it is said, "Forasmuch as many persons are delayed in the King's court of their demands, because that the party alledgeth that the demandants ought not to be answered without the King, and also many people be aggrieved by the King's ministers against right, in respect of which grievances no one can recover without a common Parliament: We do ordain, that the King shall hold a Parliament once in the year, or twice, if need be, and that in a convenient place: And that in the same Parliaments, the pleas which are in the aforesaid form delayed, and the pleas whereon the justices are of divers opinions, shall be recorded and determined. And, in the like manner, the bills shall be finished, which are delivered in Parliament, in such sort as law and reason demand †."

The language of this ordinance enforces *Lord Ellesmere*'s observation, as to the ground on which annual meetings of Parliaments were anciently thought necessary, and the words used in the Statutes of the 4 *Edward III.* c. 14, and 36 *Edward III.* c. 10, and 1 *Richard II* ‡. and 2 *Richard II* §. only enforce the same provisions; but it does not appear, on the face of any of these acts, that each Parliament was to be a new Parliament.

In that memorable remonstrance of the three estates to *Richard II.* in the 11th year of his reign, (before alluded to,) the Parliament expressly says, "that it appeared by an ancient Statute, and by laudable and approved usage, which no man could deny, "*Quod ex antiquo*

* Elsm. Obs. p. 47.

† Vid. Statutes of the Realm, p. 165, fol. edit. of 1810.

‡ Rot. Parl. No. 95. § Rot. Parl. No. 4.

statuto habemus, et consuetudine laudabili et approbata," that the King *might* call together his Lords, the Peers of the realm, and the Commons, once a year in Parliament; "*Quod rex noster convocare* POTEST *Dominos & Proceres regni, atque Communes, semel in anno ad parliamentum suum* *."

The Parliament does not say that Richard *must* by law call a Parliament every year, but only that he *might*. Offended, as the Parliament so justly was, with Richard, they would certainly have taunted him with a breach of positive law, rather than an abuse of a discretionary authority, if they had thought themselves justified in so doing. Barrington † is incorrect in his assertion, that no Statute was passed from the 5th to the 9th year of Edward the Third's reign; but it is very observable, that notwithstanding the 4th Edward III. c. 14, no Parliament, according to Prynne ‡, appears to have been called in the 5 Edward III. which, if true, very clearly shews, that that act was not considered as compulsory on the King. It appears too, that no Parliament was called in the 40, 41, 42, 44, 45, 46, 48, and 49th years of his reign §. I am inclined therefore to think, that the ancient Statutes of Edward III. were not so much intended to oblige the King to call a Parliament, as to oblige the subject being called; and the Statute 5 Richard II. c. 4. seems to corroborate that opinion; for by that act every person having summons to Parliament, and omitting to come, is to be amerced. *Blackstone* says ‖, and *Hatsell* concurs with him in opinion, that the Statutes in Edward the Third's reign were only meant to insure the annual meeting of Parliament, and not, as hath been sometimes supposed, annual elections ¶.

The framers of the *Triennial Bill* in 1694 ** (Lord Somers was then Lord Keeper) appear to have accurately adverted to the doctrine on this subject; for in the preamble it is said, "Whereas by the

* Vid. Knighton, Col. 2681. † Observations on the Statutes, p. 232, in n.
‡ Brevia Parliamentaria Rediviva, p. 5. § Ib. p. 6.
‖ 1 Vol. Com. p. 153. ¶ 2 Vol. Hatsell's Precedents, p. 276, in n.
** 6 and 7 William III. c. 2.

ancient laws and *statutes* of this kingdom, *frequent parliaments* ought to be held, and whereas *frequent and new parliaments* tend very much to the happy union and good agreement of the King and people: We your Majesties most loyal and obedient subjects, the Lords, &c. do most humbly beseech your most excellent Majesties," &c.

It is clear, I think, from this preamble, that the framers of it thought that, by the ancient laws and statutes, *frequent* but not *new* Parliaments were enforced.

It is observable, that the Duke of Monmouth, in his Declaration, when he rose in 1685 against King James, professed his intention, amongst other things, "to have *a Parliament annually chosen and held*, and not prorogued, dissolved, or discontinued within the year, before petitions be first answered and grievances redressed;" a proof this of the popular opinion in these matters at that period; but the Duke, it is observable, does not say that the people were, *by law*, entitled to these Parliaments*.

"*And they do claim, demand, and insist upon all and singular* "*the premises*, AS THEIR UNDOUBTED RIGHTS AND LIBER-"TIES; *and that no declarations, judgments, doings or pro-*"*ceedings, to the prejudice of the people, in any of the said* "*premises, ought in anywise to be drawn hereafter into conse-*"*quence or example. To which demand of their rights, they are* "*particularly encouraged by the Declaration of his Highness the* "*Prince of Orange, as being the only means for obtaining a full* "*redress and remedy therein. Having therefore an* ENTIRE "CONFIDENCE, *that his said Highness the Prince of Orange* "*will perfect the deliverance so far advanced by him, and will* "*still preserve them from the violation of their rights, which they* "*have here asserted, and from all other attempts upon their* "*religion, rights, and liberties.*"

* See Declaration of James Duke of Monmouth, &c.

COMMENT.

"*Entire confidence.*"—Upon this passage of the Bill of Rights, Ralph has observed. "Thus," says he, "in the very instrument which is called the New Magna Charta of the subject's liberty, we have the mortification to find *entire confidence* take place of *express contract;* and we search in vain for those other conditions and limitations which should have rendered our constitution unchangeable and immortal *."

It seems to me, that this censure, in which the author is followed by many other writers, is undeserved. Nobody who reads the paragraph throughout, but must see, that it expresses the *condition* upon which the crown was bestowed upon King William, and in fair construction amounts to what Ralph regrets the want of, viz. an *express contract.* The trust is here delicately, but exactly, expressed. With this impression, it seems to me very probable, that when the crown and the declaration was tendered to the Prince of Orange, the Prince said, "He accepted of the crown *on the conditions* mentioned in their declaration," as is stated in the MS. copy of the Journals of the House of Commons, noticed by Ralph. A constitution, of which Ralph speaks, *unchangeable and immortal,* is not to be expected, and is so far beyond the inventive powers of man, that I am surprised a grave historian should use such language. What other *conditions and limitations* he would have imposed upon King William he has not informed us, and nothing of the kind could have been effectually proposed in the then state of the nation. On this subject, however, I have before enlarged.

Mr. Somers, in the use of the word "*confidence,*" was probably influenced by the employment of that word in the Parliament Roll of *Henry IV.* No. 108, by which it appears to have been declared, in open Parliament, "that having *confidence* in the prudence and moderation of King Henry IV. they will and enact, that he enjoy the same royal authority that his ancestors enjoyed."

"11. *The said Lords Spiritual and Temporal and Commons,* "*assembled at Westminster, do* RESOLVE, *That William and Mary,*

* 2 Vol. Ralph, p. 55.

" *Prince and Princess of Orange, be, and be declared, King and* " *Queen of England, France, and Ireland, and the Dominions* " *thereunto belonging; to hold the crown and royal dignity of* " *the said kingdoms and dominions to them the said Prince and* " *Princess* DURING THEIR LIVES AND THE LIFE OF THE " SURVIVOR *of them; and that the sole and full exercise of the* " *royal power be only in and* EXECUTED BY THE SAID " PRINCE OF ORANGE, *in the names of the said Prince and* " *Princess during their joint lives; and after their deceases, the* " *said crown and royal dignity of the said kingdoms and domi-* " *nions to be to the heirs of the body of the said Princess; and* " *for default of such issue, to the Princess Anne of Denmark and* " *the heirs of her body; and for default of such issue, to the* " HEIRS OF THE BODY OF THE SAID PRINCE OF ORANGE. " *And the Lords Spiritual and Temporal and Commons do pray* " *the said Prince and Princess to accept the same accordingly.*"

COMMENT.

" *Do resolve,*" *&c.*—This resolve it was, that constituted the Prince and Princess of Orange King and Queen. This was their only real title to regal power. The Declaration of Rights required, I think, in other respects, the sanction of a bill to make it a binding law; but this resolve, as I have before insisted, required no further act to make it law. *Ex necessitate,* it had of itself all the effect of a full and complete law.

" *During their lives,*" *&c.*—Mr. Price, in his speech in the House of Commons in 1695, 6, in support of the petition against the grant made of the revenues of part of Wales to Lord Portland, used the following argument: " I would gladly know from those that are better versed in prerogative learning than myself, whether his Majesty (King William) can, by the Bill of Rights, (without the consent Parliament,)

alienate or give away the inheritance or absolute fee of the crown lands? If he can, I would likewise know to what purpose was the crown settled for life, with a remainder in succession, if the tenant for life of the crown can give away the revenue of the crown, which is incident to the crown? or can the King have a larger estate in the revenues than he has in the crown to which it belongs* ?"

King William afterwards, on the unanimous address of the House of Commons, recalled the grant; but Mr. Price, although specious, was not accurate in his argument. The King certainly had the *power* of making the grant in question, but the *expediency* of the grant was properly questioned. It was not till the 1*st of Queen Anne, Stat.* 1. *c.* 7, that the power of alienating the crown lands was restrained.

"The misfortune is, says Blackstone, that this act was made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire."

By the 26*th Geo. III. c.* 87, amended by 30*th Geo. III. c.* 50, commissioners were appointed to inquire into the state and condition of the *woods, forests,* and *land revenues,* belonging to the crown, and to sell fee-farm and other unimprovable rents.

"*To be executed by the said Prince of Orange,*" *&c.*—In a sensible tract published previous to the meeting of the Convention Parliament, the propriety of this mode of settling the crown is well described. "Seeing the sovereignty can be but in one, though the style be communicable to more, reasons of state obligeth to lodge it where it may be most for the public good. The disposal of the crown being fallen to the people by a cess and devolution, the succession unto it is not to be governed by a proximity of blood, but by weighing what is most expedient for the benefit of the community. To bestow the sovereign power unto more than one person at a time, were to embarrass the execution of it, and to make it impracticable, through the differences which may arise, if two

* Vid. Gloria Cambriæ: or, the Speech of a bold Briton against a Dutch Prince of Wales. See also "The Life of Robert Price, Esq." p. 28.

should become equally vested in it. From thence it was, that upon the constituting and creating Philip, King, in conjunction with Mary, the daughter of Henry VIII. it was ordained and enacted, 'That the Queen might and should solely, and as sole Queen, use, have, and enjoy the crown and sovereignty of and over all these realms, dominions, and subjects, with all the preeminences, prerogatives, dignities, authorities, jurisdictions, honours, thereunto belonging, &c.; and that no right or claim of sovereignty should be given, come, or grow unto the said Philip over these realms and dominions.' But, though the sovereign power be not communicable to more than one, and can be lodged no where, save in a single person, yet the royal style may be imparted to more, without the least inconvenience arising thereby to the nation. And, therefore, when I say that her Royal Highness the Princess of Orange ought to have the royal style conferred upon her, I do not thereby mean that she should enjoy merely the bare and naked name of Queen, but that, together with the person to whom the sovereignty shall be committed, she shall be named in all laws, gifts, grants, and patents, &c.; and that all these shall be enacted, instituted, set forth, and made in the name of the person in whom the sovereignty shall be fixed and settled. Nor is this all that her Highness may in justice expect, but it doth become the people, in deference to her merit, and in gratitude for the many obligations which she hath heaped upon them, to settle the whole sovereignty upon her in reversion, in case she outlive the person to whom that power is first trusted and committed. And as this will testify that the disposal of it otherwise, for the present, ariseth not from disrespect, but from motives of necessity, so we may be assured that her Royal Highness's love to her country is so prevalent in her above all considerations regarding herself, that she would be loth in the mean time, and under the great and present exigencies, to interpose between the nation and the blessings and safety likely to arise unto it, by the coming under the governing care and sovereign protection of his Highness the Prince her husband. Nay, she would account it an injury unto her, and not a favour, to have the royal power settled in her during the life of the Prince, and to have his Highness precluded from it. And as

through her being vested in what I have named, she will enjoy all the honour and glory which accompany a crown, so she will be only eased of the thorny cares, and the next to insupportable toils, that, under the present conjuncture of affairs in the world, are likely to attend the swaying of the English sceptre*."

In case of the death of Queen Mary during the life of William, the Prince was to be, as he did afterwards become, sole sovereign, not only in power, but in title. If therefore, during the life of Mary, the lovers of indefeasible hereditary right could, by any kind of reasoning, convince themselves that their principles were not struck at by the proceedings that had taken place, yet surely, on the death of Queen Mary, they must have felt it utterly impossible to say, that King William reigned in comformity with their principles. His title by election was then most conspicuously apparent. But for that election, the Prince of Orange had no more right to the throne of England than any one of its inhabitants; and it is, indeed, happy for the lovers of liberty, that Queen Mary died before her consort, for had she survived him, the principles of the revolution would not have been so amply illustrated as they were by that event. Upon these proceedings a writer of those times justly remarks, "It will be a caution to succeeding Kings, of what fatal consequence a general derogation from the laws may be, when they find, by this instance, the exercise of the kingly office in danger, not only with reference to themselves, but precarious to their family by their misgovernment; and generations to come shall praise our conduct, when, reading the history of this day, it appears we understood our case had honour and honesty to maintain it, and wisdom enough to maintain it perfect to our posterity†.

Though the nation exploded the absurd notions of *divine, indefeasible, hereditary right*, yet it was unwilling to adopt the other extreme, and shew itself altogether averse to hereditary government, so long as it was consistent with the ends of all good government, *the happiness*

* Vid. Brief Justification of the Prince of Orange, &c.

† See "Reasons humbly offered," &c.

of the people. In this spirit the Bill of Rights provides, that on the decease of the King and Queen without issue, the crown shall devolve on the Princess Anne and her heirs. The Princess Anne (if we assume that James the Second's son was suppositious) was the next in succession; and as she was a Protestant, and of principles compatible with the spirit of the British constitution, she was named in succession, and in preference even to the heirs by a second wife of our great deliverer. That the executive power was solely invested in King William, appears from an Act of Parliament passed in 1690, just previous to King William's departure for Ireland, which has these words, "That whereas by the Act of Settlement, the perfect and full exercise of the regal power was *vested only in the King*, though it was to be exercised in the names of both King and Queen; and whereas his Majesty had resolved to make a royal voyage, and had declared his pleasure to have the administration in the hands of the Queen, it was enacted, That whensoever and as often as his Majesty should be absent, it should be lawful for the Queen to administer the government; provided, nevertheless, that the King's orders during his absence should be as good and effectual as if his Majesty was within the realm, and that on his return the whole administration should return to and remain in his hands, as before *."

When the Bill of Rights was brought forward in the first session of the first Parliament of King William and Mary, the House of Commons proposed to insert a proviso, after the above limitations in the Bill of Rights, in these words, "Provided always, and it is hereby declared by the authority aforesaid, that nothing in this act is intended to be drawn into example hereafter to prejudice the right of any Protestant Prince or Princess in their hereditary succession to the imperial crown of these realms." But this proviso, whatever was the view with which it was proposed, was rejected †.

When the bill went up to the Lords, Bishop Burnet, at the desire of King William, proposed by way of amendment, naming the Duchess of Hanover, and her posterity, next in the succession after the limitation to

* 2 William and Mary, Sess. 1, c. 6.

† See 2 vol. Ralph, p. 130, 1.

the heirs of the body of the Prince of Orange. The Lords agreed to the proposition without any oppositition, and the bill was sent down to the House of Commons, where the debates were violent. Hampden pressed it vehemently, but Wildman and all the republican party opposed it, so that the bill with these amendments was rejected. A free conference was desired and agreed to, but the Lords adhered, and refused to relinquish their amendments. Another conference with the Lords was desired, but refused; and thus both parties obstinately adhering, the bill was lost. Upon this the House of Commons adjourned from the 31st of July to the 2d of August, the shortest adjournment ever known; when they made an order that a committee should inspect the journals of both houses, to examine whether there was any precedent of a free conference, in which the freedom of debate was denied concerning the subject matter of such conferences *.

Though the Bill of Rights was thus lost in the first session, yet another bill, a copy of the former, was, in the second sessions, brought into the House of Commons. The Lords no longer insisted on the Hanover clause, but contented themselves with providing only the clause inserted at the latter end of the bill, (*post.*) viz. "That the crown and government of these realms should from time to time descend to, and be enjoyed by such persons, beings Protestants, as should have inherited the same, in case the several persons who, by the same act, were disabled from succeeding on account of their being Papists, or, having married Papists, were naturally dead †."

"*Accept the same.*"—It has already been observed that King James the Second had forfeited his throne, *both for himself and his heirs;* and thereby the same devolved back to the people, who, by their representatives, disposed of the same according to their will and pleasure, so as best to maintain their happiness and security. And here we see this fundamental principle illustrated by the appointment of the Prince and Princess of Orange, King and Queen of England. It affords a solemn precedent for all ages. The Prince of Orange made no claim to the

* 2 Ralph, 131, 133. † 2 Ralph, p. 179.

throne, as *of right*, nor did the two Houses acknowledge any such claim. He owed his sovereignty to a *parliamentary election* of the people. A better title none could have, nor could any one better deserve it. The son of King James was passed over without his name being hardly mentioned. It is true, that it was asserted that he was a *suppositious* child; but no conclusive proofs, I think, were brought forward to substantiate so enormous a charge against King James. On *Sacheverell*'s trial, of which more will be said hereafter, the birth of the Prince was admitted; and it was shewn, that the Princess of Denmark had no other than a parliamentary title to the crown. Suppositious or not, he had no right to the throne; and therefore no inquiry was instituted on the subject. The nation resolved to confer the crown on King William, and it did so. Some persons, assuming that the son of James was suppositious, contended that the crown devolved on Mary, the eldest daughter of King James, and the wife of the Prince of Orange; but this was denied, inasmuch as James had by his conduct *forfeited* the crown *for himself and his heirs*. It is true, that Mary is, as above, appointed Queen; but it was merely a barren title, to which no power was appended, for the executive power was exclusively vested in the Prince. It was a compliment paid, and very deservedly paid, to her exemplary conduct, and was considered, perhaps, as an unimportant concession to the foolish sticklers for indefeasible hereditary right.

III. "*And the Oaths hereafter mentioned be taken by all* "*Persons of whom the Oaths of Allegiance and Supremacy might* "*be required by Law, instead of them; and that the said Oaths* "*of Allegiance and Supremacy be abrogated.*

"*I, A. B. do sincerely promise and swear, that I will be faith-* "*ful and bear true Allegiance to their Majesties King William* "*and Queen Mary. So help me God.*

"*I, A. B. do swear, that I do from my Heart abhor, detest,* "*and abjure, as impious and heretical, that damnable Doctrine* "*and Position, that Princes excommunicated or deprived by the*

"*Pope, or any Authority of the See of Rome, may be deposed* "*or murdered by their Subjects, or any other whatsoever. And* "*I do declare, that no foreign Prince, Person, Prelate, State,* "*or Potentate, hath, or ought to have, any Jurisdiction, Power,* "*Superiority, Pre eminence, or Authority, Ecclesiastical or Spi-* "*ritual, within this Realm. So help me God.*"

COMMENT.

By the 1*st William and Mary, ch.* 1, these oaths, mentioned in the Declaration of Rights, and here recited, were appointed to be taken.

The Tories, though they had struggled for a regency, and endeavoured to obstruct a departure from the line of succession, were by no means willing to be excluded from trust and employment under the new government. It was therefore referred to the leaders of that party in the House of Lords, to contrive such a form of the oath of allegiance as might secure their attachment and services to the new government, while it did not offend their conscience or violate their honour *. They scrupled to acknowledge William as their *rightful* and *lawful* sovereign, but they were ready to swear fidelity and allegiance to the King in possession. It was the saying of Lord Nottingham, that, "though he had never in the least consented to the revolution, but had, with all his might, opposed the Prince's succession, as contrary to law; yet, since his Highness was here, and we must owe our protection to him, as King *de facto*, he thought it was but just and legal to swear allegiance to him †." This led the way to the great controversies respecting kings *de jure* and *de facto*. Many held that James, after his deposal, was still a king and prince‡; and *Sir Matthew Hale* § sanctioned that opinion, and thereby unfortunately led multitudes astray; but their error is admirably well pointed out by *Sir Michael Foster* ‖.

* Lords' Journal for 6 Feb. 1689.

‡ Plea for Lords, p. 329, 460.

‖ Foster's Crown Law, p. 379, &c.

† See Reresby's Memoirs.

§ Pleas of the Crown.

A passage from Bishop Burnett's History will throw light upon this part of the Bill of Rights.—"The last debate," says he, "was concerning the oaths which should be taken to the King and Queen. Many arguments were taken, during the debate, from the oaths in the form in which the allegiance was sworn to the crown, to shew, that in a *new settlement* these could not be taken. And to this it was always answered, that care should be taken, when other things were settled, to adjust these oaths, so that they should agree to the new settlement. In the oaths as they were formerly conceived, a *previous title* seemed to be asserted when the king was sworn to, as *rightful and lawful king*. It was therefore said, that these words could not be said of a king *who had not a precedent right, but was set up by the nation.* So it was moved that the oaths should be reduced to the ancient simplicity of swearing to bear faith and true allegiance to the King and Queen. This was agreed to. And upon this began the notion of a king *de facto*, but not *de jure*. It was said, that according to the common law, as well as the statute in King Henry the Seventh's reign, the subjects might securely obey any king that was in possession, whether his title was good or not. This seemed to be a doctrine necessary for the peace and quiet of mankind, that so the subjects may be safe in every government that bringeth them under a superior force, and that will crush them if they do not give a security for the protection that they enjoy under it. The lawyers had been always of that opinion, that the people were not bound to examine the titles of their prince, but were to submit to him that was in possession. It was therefore judged just and reasonable, in the beginning of a *new government*, to make the oaths as general and comprehensive as might be; for it was thought that those who once took the oaths to the government would be after that faithful and true to it. This tenderness, which was shewed at this time to a sort of people that had shewed very little tenderness to men of weak or ill informed conciences, was afterwards much abused by a new explanation, or rather a gross equivocation as to the signification of the words in which the oath was conceived. The true meaning of

the words, and the express sense of the imposers, was, that, whether men were satisfied or not with the putting the King and Queen on the throne, yet now they were on it, they would be true to them and defend them. But the sense that may be put on them was, that they were only to obey them as usurpers during their usurpation; and that therefore, as long as they continued in quiet possession, they were bound to bear them, and to submit to them; but that it was lawful for them to assist King James, if he should come over to recover his crown, and that they might *act and talk as they could or durst* in his favour, as being still their king *de jure*. This was contrary to the plain meaning of the words, *faith and true allegiance*, and was contrary to the express declaration in the act that (afterwards) enjoined them: yet it became too visible that many in the nation, and particularly among the clergy, took the oath in this sense, to the great reproach of their profession. The prevarication of too many in so sacred matter contributed not a little to fortify the growing atheism of the present age."—"The truth was," continues the bishop, "the greatest part of the clergy had entangled themselves so far with those strange conceits of the divine right of monarchy, and the unlawfulness of resistance in any case; and they had so engaged themselves by asserting these things so often and so publicly, that they did not know how to disengage themselves in honour or conscience *." It was *Lord Nottingham* who moved for the new oaths, and *Lord Clarendon*, a son of the famous chancellor, was the person who drew them †.

"IV. *Upon which their said Majesties did* ACCEPT *the* "*Crown and Royal Dignity of the Kingdoms of England, France,* "*and Ireland, and the Dominions thereunto belonging,* ACCORD-"ING TO THE RESOLUTION *and Desire of the said Lords and* "*Commons contained in the said Declaration.*"

* 1 Vol. Burnet's History of his own Times, p. 822, fol. edit.

† Vid. Journals of the House of Lords, Feb. 7, 1689.

COMMENT.

According to a MS. copy of the journals of the House of Commons, quoted by Ralph, it is said, that upon the tender of the crown by Lord Halifax to King William, "He thanked them heartily for *their great kindness* to him, and *confidence* in him; *that he accepted of the crown on the conditions mentioned in their declaration;* and that as he came hither for the defence of the Protestant religion, so he would ever study to preserve it, together with the laws of the land, and the liberties and properties of the people *." The speech, as given in the printed journals, is much to the same effect. What is this, but the language of an *elected* king? Of one who, as Ralph says, "had no other title to the throne but the good will of the people he was to govern †."

It is observable, that where the act recites the acceptance of the crown by the Prince and Princess of Orange, it no longer designates them by that title, but afterwards entitles them "*their Majesties.*" Some whimsical arguments have been founded on this circumstance, such as, that the Lords and Commons could only *tender*, not *confer*, *give*, or *constitute;* and that it was the acceptance and assumption which made the Prince of Orange King!

"V. *And thereupon their Majesties were pleased, that the "said Lords Spiritual and Temporal, and Commons, being two "Houses of Parliament,* SHOULD CONTINUE TO SIT, *and with "their Majesties Royal Concurrence make effectual Provision "for the Settlement of the Religion, Laws, and Liberties of this "Kingdom, so that the same for the Future might not be in "Danger again of being subverted; to which the said Lords "Spiritual and Temporal, and Commons, did agree and proceed "to act accordingly.*"

* 2 Vol. Ralph's History, p. 55, 56.

† Ralph, 2 vol. p. 57. See Grey's account of the Prince's answer. Vid. 9 vol. Grey's Debates, p. 33.

COMMENT.

Many persons doubted the power of King William to convert the Convention into a Parliament, it not having been convoked by the *King's* writ of summons*. "The experiment of a new election," says Smollett, "was deemed too hazardous; therefore the council determined, that the King should, by virtue of his authority, change the Convention into a Parliament, by going to the House of Peers with the usual state of a sovereign, and pronouncing a speech from the throne to both Houses †." Mr. Somers took great pains in support of this proceeding ‡.

When the King had converted the Convention into a Parliament, a Bill was brought in §, by which the Lords and Commons, assembled at Westminster, were *declared* to be the two Houses of Parliament, to all intents and purposes. Upon this act it has been observed, that the *declaration* itself proves the contrary of what it asserts: for if they really were the two Houses of Parliament, there could be no need of a law to make or to declare them such. This is curious reasoning. According to this doctrine, the Declaration and *Bill of Rights* were unnecessary, for they are only *declaratory*. The use of a declaratory law is to settle *doubts;* and for that purpose it was used upon this occasion.

"*VI. Now, in pursuance of the premises, the said Lords Spi-*
"*ritual and Temporal, and Commons, in Parliament assembled,*
"*for the ratifying, confirming, and establishing the said Decla-*
"*tion, and the Articles, Clauses, Matters and Things therein*
"*contained,* BY THE FORCE OF A LAW MADE IN DUE FORM
" BY AUTHORITY OF PARLIAMENT, *do pray, that it may*

* See *post.*

† Continuation of Hume, vol. 1, p. 7.

‡ MS. Communication by the Earl of Hardwicke.

§ See 1 Wm. and Mary, c. 1.

" *be* DECLARED *and enacted, That all and singular the Rights* " *and Liberties asserted and claimed in the said Declaration,* " *are* THE TRUE, ANCIENT, AND INDUBITABLE RIGHTS " AND LIBERTIES OF THE PEOPLE OF THIS KINGDOM, *and so* " *shall be esteemed, allowed, adjudged, deemed, and taken to be;* " *and that all and every the particulars aforesaid shall be firmly* " *and strictly holden and observed, as they are expressed in the* " *said Declaration; and all officers and ministers whatsoever shall* " *serve their Majesties and their successors according to the* " *same, in all times to come.*"

COMMENT.

" *By the force of a law made in due form by authority of Parliament,*" *&c.*—This is a plain acknowledgment, that the *Declaration* of Rights had not, as before observed, p. 250, the force of a *Declaratory Statute,* until the passing of the *Bill* of Rights.

" *Declared,*" *&c.*—This word *declared* is never used unless in *Declaratory Statutes,* and always, as Lord Kenyon observes, *with great caution**. *A Declaratory Statute,* says Blackstone, is where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum rei testimonium,* and for avoiding all doubts and difficulties, to declare what the common law is, and ever hath been †."

" *VII. And the said Lords Spiritual and Temporal, and* " *Commons, seriously considering how it hath pleased Almighty* " *God, in his marvellous providence and merciful goodness to* " *this nation, to provide and preserve their said Majesties royal*

* 3 T. R. 546.

† 1 Vol. Commentaries, p. 86. See also what Sir Edward Coke says, Co. Litt. 76a, 290b.

" *persons most happily to reign over us upon the Throne of their* " *ancestors, for which they render unto him, from the bottom of* " *their hearts, their humblest thanks and praises, do truly, firmly,* " *assuredly, and in the sincerity of their hearts, think, and do* " *hereby recognize, acknowledge, and declare, that King James* " *the Second, having abdicated the government, and their* " *Majesties having accepted the crown and royal dignity, as* " *aforesaid, their said Majesties* DID BECOME, *were, are, and of* " *right ought to be, by the laws of this realm, our Sovereign* " *Liege, Lord and Lady, King and Queen of England, France,* " *and Ireland, and the Dominions thereunto belonging; in and* " *to whose princely persons the royal state, crown, and dignity of* " *the said realms, with all honours, styles, titles, regalities, pre-* " *rogatives, powers, jurisdictions, and authorities to the same* " *belonging and appertaining, are most fully, rightfully, and* " *entirely invested and incorporated, united and annexed.*"

COMMENT.

"*Did become,*" *&c.*—The language of the act fully justifies the observation before made, p. 249, 250, and shews, that the *nomination* of the Prince and Princess of Orange, as King and Queen, and their *acceptance* of the *trust*, constituted them King and Queen; and this was so *ex necessitate:* but *how long* they should be so, and the *limitation* of the crown, was not, *ex necessitate*, necessary, but was a proper subject of legislative deliberation by King, Lords, and Commons.

It is surprising that a lawyer and a scholar should be so far misled as to assert, " that the notion of the King receiving his power from the people is unknown to the law and usage of this realm. " For," says he, " by the law and usage of this realm, a King of England can only be made by himself, or some other King, with the authority of Parliament *!" Such an opinion is in the teeth of the Bill of Rights, which so strongly

* Thoughts on the English Government, 2d Letter, p. 164.

asserts, that by the *acceptance* of the crown *in the manner mentioned in the Bill of Rights*, their Majesties *did become*, were, and are, and of right by the laws of this realm, King and Queen. No less than thirty-four acts were passed (some of them of the highest importance) before the *Bill* of Rights passed. Several of these fundamental acts are still in being; but they would be no more than waste paper, if it were true that the Prince and Princess of Orange did not become King and Queen, until the passing of the Bill of Rights.

"*VIII. And for preventing all questions and divisions in this* "*realm, by reason of any pretended titles to the crown, and for* "*preserving a* CERTAINTY IN THE SUCCESSION *thereof, in* "*and upon which the unity, peace, tranquillity, and safety of* "*this nation doth, under God, wholly consist and depend:* "*The said Lords Spiritual and Temporal, and Commons, do* "*beseech their Majesties, that it may be enacted, established, and* "*declared, that the crown and regal government of the said* "*kingdoms and dominions, with all and singular the premises* "*thereunto belonging and appertaining, shall be, and continue* "*to their said Majesties, and the survivor of them, during their* "*lives, and the life of the survivor of them: And that the entire,* "*perfect, and full exercise of the regal power and government be* "*only in, and executed by his Majesty, in the names of both their* "*Majesties, during their joint lives; and after their deceases, the* "*said crown and premises shall be and remain to the heirs of* "*the body of her Majesty; and for default of such issue, to her* "*Royal Highness Princess Anne of Denmark, and the heirs of* "*her body; and for default of such issue, to the heirs of the* "*body of his said Majesty: And thereunto the said Lords Spi-* "*ritual and Temporal, and Commons, do, in the name of all the* "*People aforesaid, most humbly and faithfully* SUBMIT THEM-

"SELVES, THEIR HEIRS AND POSTERITY FOR EVER; *and* "*do faithfully promise, that they will stand to, maintain, and* "*defend their said Majesties, and also the limitations and succession of the crown herein specified and contained, to the* "*utmost of their powers, with their lives and estates, against* "*all persons whatsover that shall attempt any thing to the* "*contrary.*"

COMMENT.

"*Certainty in the succession,*" *&c.*—This same opinion, in favour of a *certainty* in the succession, is reiterated in the Act of Settlement, 12th and 13th *William,* by which the succession of the crown was further limited, and by which limitation, passing over the next heir, in favour of a remoter heir, the parliamentary rights of the people were asserted and exercised, and the *election* of the Brunswick family was clearly demonstrated. The absurd doctrine *, that the crown of England is "an unalterable entail, and the reversion in him only by whom kings reign," was cut up by the roots.

A predilection in favour of a lineal succession to the crown, as exhibited at the Revolution, is bottomed on the truest political wisdom; but then that adherence must not be considered, in such a crisis, as a matter of *right,* but only as a matter of eminent *expediency.* The Convention Parliament might, by law, have placed the crown on what head it pleased. It might have placed it on the head of Mr. Somers. Such an election would have been *indiscreet,* but not *unlawful.* "A title by descent," says *Judge Foster,* "was always esteemed by the legislature a wise expedient in government; but *in cases of necessity* it was never thought to confer an indefeasible right, because that would have been to defeat the end for the sake of the means †." *Montesquieu* has some excellent observations to the same effect ‡.

Nothing but an imperative necessity can ever justify the two Houses

* See Johnstone on Monarchy, p. 470.

‡ Foster's Crown Law, p. 405.

† *De L'Esprit des Loix, liv.* 26, *chap.* 16.

of Parliament in exercising a right of election. The Revolution, it is true, was, in the first instance, accomplished without bloodshed: but what rivers of blood flowed in consequence of it! what plots, what insurrections, what rebellions, what instability of property, and destruction of social comforts, ensued! These sad consequences were certainly, in a great degree, but not wholly, attributable to the uncertainty of the law on the subject; for the power of Parliament, and the doctrine of resistance, was not then so thoroughly established as it is at present.

"*Beseech their Majesties, that it may be enacted, established, and declared,*" &c.—After such words, usually follow the words, "And be it enacted," &c.; but in this Statute the enacting part, for the greater solemnity, I suppose, forms a section by itself: see section 11. It is, I believe, the only Statute in which that form is used.

"*Humbly and faithfully submit themselves, their heirs and posterity for ever.*"—The same language is used in the Act of Settlement, 12 and 13 *William;* yet, perhaps, the words, *their heirs and posterity for ever*, should have been omitted. Such words, affecting a prospective, unalterable legislation, may certainly be found in many precedents, and was probably acceptable to the prejudices of some persons, but it does not seem conformable to sound constitutional doctrine. No political truth is more salutary, or better established, than that one Parliament cannot irrevocably bind another. There never did, there never can exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right, or power, indefeasibly and irrevocably to bind and controul posterity, or command for ever, how a nation shall be governed, or who shall govern it. A renunciation of personal rights of the highest nature can have no operation beyond the persons of those who renounce them. Such was the fondness for *Magna Charta*, and it was so often confirmed, that it gave rise to a rule, says *Mr. Hume*, which, though vulgarly received, seems in the execution impracticable, viz. That even a Statute which should be enacted in contradiction to any article of that charter, cannot have force or validity *. In this opinion he certainly was correct.

* 6 Hume, p. 247.

"Statutes," says an excellent modern writer, "which describe the people of a country as 'most humbly and faithfully submitting themselves, their heirs and posterity for ever,' to any particular family, or as binding themselves, their heirs and posterity, to that family, its heirs and posterity, or to any particular form of government whatever, to the end of time, profess to dispose of the rights of succeeding generations, which are beyond the reach of their controul, and afford an example of language equally extravagant and nugatory *.

In the beginning of the reign of *James I.* the Parliament used nearly the same words as are employed in the Bill of Rights. They obliged themselves and their posterity to maintain the hereditary succession in him and his posterity, and that, *for ever.*

We see how the lawyers at the Revolution, construed those words: The settlement then made shewed the insignificance of such language; but such language is not merely harmless, it is mischievous. When Charles I. violated his trust, many of all orders and professions felt themselves shackled by such language, and doubted their *legal* right to extricate themselves from their difficulties.

The conduct pursued towards Charles I. and that towards James II. has clearly shewn there is no magic in such words, and that they speak only to the prejudices and ignorance of people, and not to their reason; and this, I apprehend, was the cause why they were used in the Bill of Rights. It was a compliment to the Tories, a concession to prejudice. Whether such a compliment should have been paid, at the expence of an important truth, is quite another question. The danger of such language may be seen in the web of sophistry which Mr. Burke spun out of the above words in the Bill of Rights! How false, that the 12th and 13th of William formed an establishment to secure that kind of succession which is, without exception, to preclude a choice of the people *for ever* †! Mr. Burke alludes to Lord Somers; and (strange to say!) fancies that he sanctions his gross misapprehension of this part of the

* Gisborne's Duties of Men, vol. 1. p. 23, in note.

† See Reflections on the Revolution in France, Burke's Works, 3 vol. p. 42, &c.

Bill of Rights. It has before been shewn what was *Lord Somers's* opinion of indefeasible rights; and *Lord Bacon* had said before him, "that if a law were made, that no new Statute should be made during seven years, and the same Statute be repealed within seven years, if the first Statute should be good, then no repeal could be made thereof within that time: for the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, *perpetua lex est nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit initio non valet* *."

These words, "*for ever*," are used in both the Union Acts for Scotland and Ireland in the clause relating to the church, and in that for uniting the two kingdoms; but, says an author who is not so very often quoted in favour of the rights of the people, "this is not, in truth, a parliamentary expression; all acts," says he, "are in fact made to last for ever, if none other is made to repeal them; and even these Acts of Union are capable of being repealed, notwithstanding the seal of perpetuity attempted to be put upon them in this unparliamentary phrase †." At the period of the union with Ireland, Mr. Pitt and others maintained the same doctrine, and practically, at least, proved, there are no other than natural and moral bounds to the competency of Parliament.

"*Against all persons whatsoever*," *&c.*—Against whom to defend these rights? Against the abdicated King, his son, and their adherents; and not, as Mr. Burke supposes, against any future necessity arising from circumstances similar to those which occurred at the Revolution. This part of the Bill of Rights cannot properly be supposed to preclude the two Houses of Parliament from choosing a King, though it marks, in strong terms, the policy of adhering to a fixed succession, except in cases where an imperious necessity makes a departure from it unavoidable. After the experience which the Whigs had of the abuse by

* 4 Vol. Bacon's Works, p. 45, folio edit. Bacon carries his doctrine too far. Such a Statute would not be *void*, but certainly, it might be *repealed*.

† Reeves on Coronation Oath, p. 39.

kings of their trust, they could hardly think, by settling the succession, thereby to rivet and fasten sovereigns upon the people of England, incapable of change, though their sway should prove mischievous and tyrannical. It cannot therefore be true, what Mr. Burke has so unadviseably asserted*, that by this settlement it was meant "*to exclude for ever*" what he calls "the Old Jewry Doctrine, of a right to choose our own governors."

I agree most cordially with that writer, "that experience has taught us, that in any other course or method than that of an *hereditary crown*, our liberties cannot be regularly pepetuated and preserved sacred as our *hereditary right*. An irregular, convulsive movement may be necessary to throw off an irregular, convulsive disease; but *the course of succession is the healthy habit of the British constitution*†."

It would be an unnecessary attempt to prove how well suited an hereditary monarchy is to this country. It is, indeed, the government the best suited, and the most natural to man; so much so, that all governments have, more or less, a tendency to it. "As our monarchy is constituted, an hereditary right is much to be preferred before election; because the government here, especially by some late amendments, is so regularly disposed in all its parts, that it almost executes itself. And therefore, upon the death of a Prince, the administration goes on without any rub or interruption. For the same reasons, we have less to apprehend from the weakness or fury of our monarchs, who have such wise councils to guide the first, and laws to restrain the other. And therefore this hereditary right should be kept so sacred as never to break the succession, *unless where the preserving of it may endanger the constitution*, which is not from any intrinsic merit or unalienable right in a particular family, but to avoid the consequences that usually attend the ambition of competitors, to which elective kingdoms are exposed, and which is the only obstacle to hinder them from arriving at the greatest perfection that government can possibly reach‡."

* See 3 Vol. Burke's Works, p. 42, quarto edit. † Ib. p. 48.

‡ Swift's Works, vol. 2. p. 371. "Sentiments of a Church of England Man."

There is great profoundness in the observation of *Whitelocke*, in the memorable conference after the famous battle of Worcester, at which time, *forms* of government, were discussed. "The laws of England," says he, "are so interwoven with the power and practice of monarchy, that to settle a government without something of monarchy in it, would make so great an alteration in the proceedings of our law, that you have scarce time to rectify, nor can we well foresee the inconveniences which will arise thereby*." Sir Bartholomew Shower truly says, "The inclinations of Englishmen, and the laws of the land, will never quadrate with a commonwealth †."

"*IX. And whereas it hath been found by experience, that it is "inconsistent with the safety and welfare of this Protestant "kingdom to be governed by a Popish Prince, or by any King "or Queen marrying a Papist, the said Lords Spiritual and "Temporal, and Commons, do further pray, that it may be enacted, "That all and every Person and Persons that is, are, or shall be "reconciled to, or shall hold communion with, the See or Church "of Rome, or shall profess the Popish Religion, or shall marry a "Papist, shall be excluded, and be for ever incapable to inherit, "possess, or enjoy the crown and government of this Realm, and "Ireland, and the Dominions thereunto belonging, or any part "of the same; or to have, use, or exercise any regal power, "authority, or jurisdiction, within the same; and in all and every "such case or cases the people of these Realms shall be, and are "hereby* ABSOLVED FROM THEIR ALLEGIANCE; *and the "said crown and government shall, from time to time, descend to, "and be enjoyed by such person or persons, being Protestants, as "should have inherited and enjoyed the same, in case the said*

* Whitelocke's Memorials, p. 492.

† 3 Vol. State Trials, p. 778, Harg. Edit.

"*person or persons, so reconciled, holding communion, or profes-*
"*sing, or marrying, as aforesaid, were naturally dead.*"

COMMENT.

"*Inconsistent with the safety,*" *&c.*—On this part of the Bill of Rights, Mr. Somers observes, "Nothing is more certain than what is here asserted, that it is inconsistent with the safety of this Protestant kingdom to be governed by a Popish Prince, or by any King or Queen marrying a Papist. If we look back to the public transactions in the days of King Charles the First, we shall soon be convinced of this undeniable truth, since we may derive all our domestic and civil disturbances from his marrying a Popish French Princess, who at last became so troublesome to him, that he was forced to send home to France again all her attendants, in hopes to bring her to a better temper, by removing from her such Popish emissaries as were thought to put her upon some dangerous designs, which made the nation jealous of her secret intrigues with France, yea, and sometimes of the very King's religion, as if he had been perverted by the Queen or her priests, or had shown himself somewhat too much inclined to the Popish way of worship. But whether things were just as the people fancied them, or not, it is certain this unlucky match was the occasion of our civil wars, and of so much bloodshed in these three nations. Such another suspicion as this was the secret spring of all our late domestic troubles during the reign of King Charles the Second; for though he professed outwardly the Protestant religion, yet the people, upon what grounds I know not well, could not be sometimes satisfied, but that he was either a Papist or popishly inclined; and upon this very account the nation was always apprehensive of French pensioners, of Popish plots, of tyranny and arbitrary power. Now such apprehensions and fears could not but be the seed of divisions among us, of heartburnings, and either of grounded or groundless jealousies, to the endangering the peace and safety of the whole kingdom. So true it is, that it is inconsistent with the safety of this kingdom to be governed by by a Prince thought to be popishly affected, but sure far more to be

governed by a sincere, zealous, and professed Papist, as we all know King James gloried to be. How near we were the brink of our ruin during his reign, and how unavoidable our entire ruin was, had he reigned longer over us, is so evident to all seeing men, that I need not enlarge upon the matter here. I shall only add in this place, in order to make out the truth of what is asserted by the late Parliament, that it is inconsistent with the safety of this Protestant kingdom to be governed by a Papist, *that when our Prince is a real Papist, he is obliged, by the principles of his religion, to do his utmost endeavours to subject his subjects to the Pope's jurisdiction* *."

"*Reconciled to*," &c.—These words are highly important, and their meaning is not, perhaps, sufficiently explained. What shall be construed a *reconciliation?* Are we to construe it according to the acceptation of the word by Protestants or Catholics? What shall be construed as, "*holding communion*," with the Church and See of Rome? It seems, that to come within the meaning of these phrases, the Prince must become, to all intents and purposes, a Roman Catholic. He must have completely embraced that persuasion. God forbid, that the period should ever arrive, when a parliamentary definition of these expressions should become necessary.

By the Statute of the 12 *Geo. III. c.* 11, no descendant of the body of King George II. (other than the issue of Princesses married into foreign families) is capable of contracting matrimony without the previous consent of the King, his heirs or successors, signified under the great seal; and any marriage contracted without such consent is void: Provided, that such of the said descendants, as are above the age of twenty-five, may, after a twelvemonth's notice given to the King's Privy Council, contract and solemnize marriage without the consent of the King, &c.; unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at any such

* "A Defence of the Proceedings of the late Parliament," 1 vol. State Tracts, temp. William, 215.

prohibited marriage, incur the penalties of the Statute of provision and præmunire. This act was highly necessary; for, as the Royal Family were expressly excepted out of the act of 26 *Geo. II. c.* 33, they were, as to marriages, liable to all those evils which, in the case of the subject, had been so carefully provided against in that act. A recent writer (for whom I feel great respect) has contended, that the Royal Marriage Act did not, and indeed could not, disable our Princes from contracting matrimony in a *foreign country*, and that it has not provided against such a marriage *; but in this latter proposition, it seems to me, he is mistaken. An Act of Parliament cannot controul the laws of a foreign country, or render a marriage in such country invalid, so far as it affects that country, or other foreign countries; but it may render such a marriage invalid, to all intents and purposes, so far as respects England, and every place to which its jurisdiction extends. A marriage in Italy, for instance, may be a good Italian marriage, and entitle the parties to all those marital rights, and the children to all those benefits, which Italian law confers on married persons, or which any foreign laws confer on married foreigners; but an act may say, and I think the act of George the Third does in effect say, that any marriage, any where, shall not be *considered* as a valid marriage, unless attended with certain ceremonies. In Italy, and in all other countries, a marriage in Italy may be a valid marriage, and such a marriage, according to the Royal Marriage Act, is not really annulled, *for that could not be;* but it is *in effect* annulled, and rendered as if no such marriage had taken place. It is in Great Britain, if not in Ireland, "null and void to all intents and purposes whatsoever." If in the Marriage Act, 26 *Geo. II. c.* 33, no exception had been introduced, relative to marriages in *Scotland*, or to marriages *solemnized beyond the seas*, such marriages, I apprehend, would, under the words "null and void to all intents and purposes whatsoever," have been void in *England*, though not in the places where they were solemnized.

* Considerations on the Royal Marriage Act by John Joseph Dillon, Esq. Barrister at Law, 1811, 2d edit.

On the occasion of the Royal Marriage Act, it was urged against it by some Lords, in their *protest*, (3d March, 1777,) that it was contrary to *natural* and *divine* laws, and was therefore *null and void in itself*. Sir Edward Coke has certainly said, that Acts of Parliament *contrary to reason* are void *, and a great modern judge seems to have been somewhat perplexed with this doctrine †; but *Coke*'s opinion was well animadverted upon by *Lord Ellesmere*, who observed of it, that it "derogateth much from the wisdom and power of Parliament, that when the three estates, the King, the Lords, and the Commons, have spent their labour in making a law, then shall three judges on the bench destroy and frustrate all their pains, because the act agreeth not (in their particular sense) with common right and reason, whereby he advanceth the reason of a particular court above the judgment of all the realm. Besides, more temperately did that Rev. Ch. J. Herle, in the time of Edward III. deliver his opinion, 8 Edward III. cited by my Lord Coke, (L. 11, s 98,) when he said, "Some Acts of Parliament are made against law and right, which they that made them perceiving, would not put them into execution; for it is *magis congruum*, that Acts of Parliament should be corrected by the same pen that drew them, than to be dashed to pieces by the opinion of a few judges ‡."

Though the King's consent to marry a Papist, according to the 12th Geo. III. were obtained, or, if refused, and no objection made by both Houses, after a year's notice to the Privy Council, yet this, I apprehend, would not so legalize the marriage of the heir apparent with a Papist, as to take away the penalties inflicted on such a marriage by the Bill of Rights and the Act of Settlement; though certainly, during the discussions relative to the proposed regency in 1788, some great statesmen seem to have maintained a very different opinion.

"*Absolved from their allegiance*," *&c.*—The clause absolving a subject in a given event from his allegiance, was proposed by *Bishop Burnet*, and seconded by the *Earl of Shrewsbury;* and Burnet

* 8 Rep. p. 118. † Vid. 1 vol. Edward's Admiralty Reports, p. 373.

‡ Observations on Lord Coke's Reports, p. 11.

observes, "it passed without any opposition or debate; which amazed us all, considering the importance of it *." No such clause, I believe, was ever before introduced into an Act of Parliament, and it involves some very material doctrine. Writers on allegiance usually divide the consideration of it, into *natural*, and *local* allegiance. The former, they say, being perpetual, and due from every subject to the King in whose dominions he was born, and the latter, that which is due from an alien or stranger born, for so long a time as he continues within the King's dominion and protection. Perhaps, (I say it with all due deference to better judgments,) it would have been more accurate, to have considered allegiance under the head, of *allegiance by birth*, and *allegiance by residence;* for by the use of the term *natural* allegiance, it might seem, that allegiance was classable with other natural obligations, such as piety, charity, &c. which, when well considered, I think, can never be admitted, although many passages in *Calvin's* case (7 Rep.) do seem to treat allegiance as being a *natural duty*, "*before law*, and *above law!*"

Now, no man can by agreement destroy a moral and natural obligation. No man can be absolved by the legislature from a natural obligation; but it is admitted, that a man may, by Act of Parliament, be absolved from what is called his natural allegiance, and the Bill of Rights, we see, in a given case, expressly absolves the subject from such his natural allegiance, as it is called, and this very case was introduced by a learned divine. Allegiance therefore must be considered, not as a natural and immutable, but only as a *legal duty*, and owes its origin to the law, and is only a natural obligation, so far as the observance of laws is a natural obligation. The doctrine as to allegiance is different in different countries, which shews it is not a natural duty. If allegiance were natural, it was due to James II. as well after, as before, his abdication; and his present Majesty is now as much entitled to the allegiance of such Americans as were alive at the separation of America, as he was before that separation; for no Act of Parliament, no mutual

* 2 Vol. Burnet's History of his own Times, p. 15.

agreement, could destroy it*. But when once we admit that allegiance emanates from the law, then it follows, it may be dissolved by law. With respect to James II. it was truly said, on high authority, "That the oaths of allegiance can be understood only in the sense limited by law, and so they cannot be conceived to bind subjects to a King who would not govern them any longer, unless he might be allowed to do it against law†."

Lord Chief Justice Vaughan expressly says, "All leigeance and subjection are acts and obligations of law *(for a man owes no leigeance excluding all civil law)*; but a man is said to be a natural subject, because his subjection begins with his birth, that is, as soon as he can be subject; and a King is said to be a man's natural Prince, because his protection begins as soon as the subject can be protected, and in the same sense that a country where a man is born is his natural country, or the language he first speaks is his natural tongue‡." This is intelligible doctrine, though *Sir Edward Coke*, I suspect, at one period of his life, would have termed it, "a damnable and damned opinion§."

To loosen the ties between the sovereign and the subject, would be highly improper; but to explain their true nature, is in reality to strengthen them. Mr. Hume expressly says, "the sole foundation of the duty of allegiance is the advantage which it procures to society by preserving peace and order among mankind‖." According to him, therefore, allegiance ceases when it ceases to be advantageous. *Glanville*, who wrote in the time of *Henry II.* has the following passages, which shew that allegiance is not due, if protection be denied.—"*Mutua debet esse domini et fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam.*"—"*Duplex et reciprocum ligamen; quia sicut*

* I have seen an able M.S. argument to this effect.

† Memorial, &c. by King William, quot. 2 Ralph, p. 731.

‡ Vid. *Craw.* v. *Ramsay* Vaughan's. Rep. p. 279, 280, S. C. in 2 Ventr. p. 6, under the name of *Collingwood* and *Pace*.

§ See his Remark on the *Spencer's Case* in Edward IId's reign. *Calvin's Case*, 7 Rep. ‖ 1 Vol. Hume's Essays, p. 235.

subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen *."

"*And that every King and Queen of this realm, who at any* "*time hereafter shall come to and succeed in the imperial crown* "*of this kingdom, shall, on the first day of the meeting of the first* "*Parliament next after his or her coming to the crown, sitting in* "*his or her throne in the House of Peers, in the presence of the* "*Lords and Commons therein assembled, or at his or her coro-* "*nation, before such person or persons who shall administer the* "CORONATION OATH *to him or her, at the time of his or her taking* "*the said oath (which shall first happen) make, subscribe, and* "*audibly repeat the Declaration mentioned in the Statute made* "*in the thirtieth year of the reign of King Charles the Second,* "*intitled, 'An Act for the more effectual preserving the King's* "*person and government, by disabling Papists from sitting in* "*either House of Parliament.' But if it shall happen, that such* "*King or Queen, upon his or her succession to the crown of this* "*realm, shall be under the age of twelve years, then every such* "*King or Queen shall make, subscribe, and audibly repeat the* "*said Declaration at his or her coronation, or the first day of* "*the meeting of the first Parliament, as aforesaid, which shall* "*first happen after such King or Queen shall have attained the* "*said age of twelve years.*"

COMMENT.

"*Coronation oath,*" *&c.*—The Coronation Oath is only incidentally adverted to in the Bill of Rights, but it is deserving of particular notice. Immediately after the Revolution, the settling of a new

* *Glanville*, l. 9, c. 4.

Coronation Oath came under the consideration of Parliament. It was certainly a measure of infinite importance, though the Historians, by their silence on the subject, seem not to have thought so *.

It was referred to a Committee "to inspect the Coronation Oath, and consider what alterations or amendments were fit to be made in it;" but the Committee, after sitting several times, could not come to a determination, and this was reported to the House; upon which, the House resolved itself into a Committee of the whole House †. Great debates ensued. The Oath, as at first proposed, was, with the exception of the words, "*established by law*," in the fifth paragraph, as follows:

"*Archbishop or Bishop* shall say,—Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the Statutes in Parliament agreed on, and the laws and customs of the same?

"*King or Queen.*—I solemnly promise so to do.

"*Archbishop or Bishop.*—Will you, to your power, cause law and justice in mercy, to be executed in all your judgments?

"*King or Queen.*—I will.

"*Archbishop or Bishop.*—Will you, to the utmost of your power, maintain the laws of God, the true profession of the Gospel, and the Protestant Reformed Religion, ESTABLISHED BY LAW; and will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges, as by law do or shall appertain unto them or any of them?

"*King or Queen.*—All this I promise to do." After this the King, laying his hand upon the Holy Gospel, shall say,

"*King.*—The things which I have here before promised, I will perform and keep: so help me God. Then the king shall kiss the book."

* *Bishop Burnet* and *Bishop Kennett* are silent on the subject, and *Dalrymple* and *Belsham* follow their example. *Ralph* dispatches the subject in a few words, and so does *Tindal*, and *Smollett* is as brief as possible.

† See Commons' Journal.

The words, *established by law*, were introduced into the oath, at the instance of *Sir Thomas Clarges*, a Tory. Many Whigs, and Mr. Somers amongst the rest, objected to the admission of those words into the oath, and Mr. Garroway, a Whig, moved, that the words of the oath should run thus, "*as it is, or shall be, established by law.*" Mr. Somers's Speech in favour of the amendment, is to be found in *Grey's* Debates. Mr. Grey's notes might answer the purpose of fixing the debates in his mind, or refreshing his memory; but on many occasions they exhibit little else than "*bald, unjointed chat.*" It is often difficult to elicit the opinion of his speakers; but it is very apparent, from the speech of Mr. Solicitor Somers, that he apprehended, the oath according to the form proposed by Sir Thomas Clarges, might be such a tie upon the King, as to operate in abridgment of the legislative power, so far as regards religion; and, in this opinion, *Polexfen*, *Treby*, and *Sawyer*, concurred.

This opinion, grounded on the language of the oath, was opposed by the Tories, who contended, *it was not justified by the wording of the oath; and they resisted the amendments, because they thought the oath left the King at liberty to act at his discretion in assenting to, or dissenting from, bills presented to him, as part of the Legislative Power; and such was the opinion of the majority* *.

It is clear, therefore, that the leading Whigs were of opinion, that the King *ought not* to be restrained in his legislative capacity by the oath; and it was the opinion of the majority, composed partly of Whigs, and partly of Tories, that the King, in his legislative capacity, *was not* restricted by the oath, and therefore the sense of Parliament, at the time of passing the act, must be taken to be, that there was not, nor was intended to be, any abridgment of the legislative power, by means of the oath. That King William took the oath in that unrestrained sense, is very obvious from the various measures in favour of the Dissenters, which were subsequently proposed at his desire; by the *Comprehension Bill*, which did not pass; and the *Toleration Act*, which did pass. On account of an ambiguous phrase, to affix any

* Vid. the Debates on the Coronation Oath, in Grey's Debates.

other meaning on the words of the Coronation Oath than that in which the Parliament that framed them, understood them, would be to turn grammarian with a vengeance. In a much more difficult case, King William disregarded the strict literal interpretation of an oath, in favour of the declared meaning of it, as expressed by those who tendered the oath. The Coronation Oath for Scotland contained, amongst others, the following words, viz. "*that they (the King and Queen) would be careful to root out heretics and enemies to the true worship of God,*" *&c.* The King observed, when the oath was tendered to him, "that he did not mean, by these words, that he was under any obligation to be a persecutor." The commissioners replied, "that neither the meaning of the oath, nor the law of Scotland, import it." Upon this, the King rejoined, "that he took the oath in that sense;" and called upon the commissioners themselves, and others present, to bear witness that he did so *. It is thus apparent that King William took his Coronation Oath, both in England and Scotland, in a different sense from what the words might, perhaps, by a strict literal construction, import. He took them in the sense of the imposers of the oath. *Serj. Maynard* took no share in the debates on the Coronation Oath. On the last day of the debate, this old patriot, obtained leave of absence from the House †. If he had been present, it is probable that his manly mind, like that of his friend Somers, would have revolted against every approach to unalterable legislation, however fair in promise. "The bare idea of a state," says Blackstone, "without a power somewhere vested, *to alter every part of its laws,* is the height of political absurdity ‡.

A recent author, not content with insisting on the supposed strict letter of the Coronation Oath, has employed all his ingenuity, in the invention of arguments, to discover and support what he conceives to have been the *policy* of our ancestors on that subject; how successfully, will be seen by a few comments on his remarkable tract. One of this author's maxims in legislation is, "*When a measure of*

* 2 Ralph, 98; and see Carstare's Life, prefixed to his State Papers.

† Vid. Journals of the House of Commons, 28th March, 1689.

‡ 1 Blackstone. Com. p. 98.

legislation is to be agitated, we are not to consider individuals, but posterity; *we are to judge neither of or for the present generation* *". This is somewhat extraordinary, for the author himself, instead of looking forward a century, in matters of legislation, seems rather to look a century backwards, and to act, not as the interest of the present age, or of posterity, may require, but according to notions of utility entertained a century ago. Very different was the opinion of Mr. Burke. That great man observed, that "*In their political arrangements, men have no right to put the well-being of the present generation wholly out of the question. Perhaps the only moral trust, with any certainty in our hands, is the care of our own times; with regard to futurity, we are to treat it like a ward. We are not so to attempt an improvement of his fortune, as to put the capital of his estate to any hazard* †." In *politics* Mr. Burke is sometimes wrong, but in *morals,* he never errs.

Alluding to the measures at the revolution, Mr. Reeves observes, "The politicians of that day saw, that they had no way of securing unalterably the Protestant religion, nor any way of binding their posterity, but by binding their King, whose political character gave a sort of individuality to the nation; and who, in all succession of time, might set himself against every attempt that should be made, even by his ministers and parliament, to repeal the Protestant constitution, which they then intended to fix for ever ‡."

According to Mr. Reeves, *unalterable legislation,* so far as regarded the *established religion,* was the object of the "great men who combined their counsels to form the settlement" at the revolution! Notwithstanding the recorded opinion of Mr. Solicitor Somers and others, against unalterable measures, Mr. Reeves unaccountably persists in attributing the Coronation Oath to the counsels of the great men of the time at which it was enacted! In truth, the great men, the most distinguished patriots, of that day (as is apparent from the debates before

* Reeves on the Coronation Oath, p. 13, 14.

† An Appeal from the new to the old Whigs.

‡ Reeves on the Cor. Oath, p. 22.

adverted to) entertained the most serious objections to the present form of the Coronation Oath. He must not attribute his own crude notions to the "distinguished patriots" of that day. If they could speak from their graves, they would disown and execrate the sentiments so injuriously attributed to them.

Mr. Reeves says, the movers of the Coronation Oath "had grown to think that the conscience of one virtuous and good man, intrusted with sovereign power, is a better security, than the wisdom of all his counsellors, in affairs of religion *." How did they learn this deep political doctrine †. Not, surely, from the preceding sovereigns, Charles and James. James was tolerably virtuous and good; but what would have been our fate, if he had been intrusted with sovereign power in affairs of religion! Kings are not proverbial for their virtue and goodness, and all the care of our greatest legislators has been, to take such precautions, as that the subjects' happiness shall not depend upon so precarious a tenure, as the virtue and goodness of a king.

Mr. Reeves seems confident, not only of the successive virtue, but also of the successive understanding, of our kings. "Whoever," says he, "sits on the British throne will always be able to judge for himself in these affairs of the church, and discharge his duty as guardian of it, not only with a good conscience, but a good understanding also ‡;" and yet, in another passage, he is against admitting Papists to be capable of office, "for though the King may keep them out of office," yet, says he, "why should the odium of making such distinctions be thrown on the King; and why should we run the hazard of some future King not making any such distinction at all §."

Mr. Reeves admits that the oath "is not so peremptory upon the King as to deprive him of a discretion to assent to some laws for alterations of a *particular sort* in the church establishment. "On such occasions," says he, "it was for the sovereign to consider what was the nature of the proposed alteration, whether it went to the substance of the establishment, or related only to some circumstance of indifference;

* Reeves on the Coronation Oath, p. 23. † Ib. p. 30.
‡ P. 32. § P. 45.

what was its degree, and whether, in complying with it, he still preserved the true spirit and general design of his oath *. It is thus he pretends to justify the Act of Toleration, and indeed all the various acts passed in the present reign in favour of the Catholics † !

I admit with Mr. Reeves, that some fundamental provisions in the Act for the Union with Scotland, and also the Act for the Union with Ireland, do affect, in words, to secure, in perpetuity, the Church of England, as established by law; but these acts do not prohibit any measures in favour of the Catholics, which have no tendency to destroy the Protestant establishment; and it is properly confessed by Mr. Reeves, that the provisions in the two Acts of Union are not binding on subsequent Parliaments‡.

Mr. Reeves is of opinion, that the Coronation Oath, as taken by our present Sovereign, does not refer to the system of law which was in force when the act which prescribed it was passed, but to the system of law in force when the oath was taken §.

What an excess of wisdom in our ancestors, to frame an oath, calculated to perpetuate laws, of which they knew nothing, and which might be framed in moments of alarm, or of religious frenzy and bigotry !

The whole of Mr. Reeves's tract is built upon the notion, that the established church, and the laws against the Catholics, were unalterably established. It seems wholly to have escaped him, that if the Parliament at the Revolution did intend any such irrevocable act, their work was miserably imperfect. For instance, let us suppose the demise of his present Majesty. The Coronation Oath is not immediately taken by his successor, and bills may pass before the Coronation Oath is taken. King William, after his election, passed many bills before he was crowned. Before the coronation, bills might be passed in favour of the Catholics. A bill might even pass to abolish the present Coronation Oath, and establish a new one. Could then the Parliament that framed the Coronation Oath intend to make the restraint on the Catholics,

* Reeves on the Coronation Oath. † Ib. p. 47. ‡ Ib. p. 30.
§ Ib. p. 62.

unalterable and irrevocable, and yet so imperfectly execute their intention? If they had meant any such thing, they would have provided, that upon the demise of the crown, the new King should take the Coronation Oath before he could assent to any legislative measure. They wanted not foresight and wisdom to suggest such a provision, but they wanted intention. They justly revolted at irrevocable measures.

All our constitutional writers, and Blackstone amongst them, when describing the power of Parliament, say, *that it may change the national religion;* but this would be exceedingly incorrect, if it were true, that the King has no power to consent to a change in the national religion.

"*Thirtieth year of the Reign of Charles II.*"—The Declaration here alluded to is most guarded, and is as follows:—"I A. B. do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe, that in the sacrament of the Lord's supper, there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary, or any other Saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous. And I do solemnly, in the presence of God, profess, testify, and declare, That I do make this Declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation, or mental reservation whatsoever; and without any dispensation already granted me for this purpose by the Pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am, or can be acquitted before God or man, or absolved of this Declaration or any part thereof, although the Pope, or any other person or persons, or power whatsoever, should dispense with, or annul the same, or declare that it was null or void from the beginning."

The same oath is required to be taken by the *Act of Settlement*, 12 and 13 William III. c. 2.

"*XI. All which their Majesties are contented and pleased,* "*shall be declared, enacted, and established by authority of* "*this present Parliament, and shall stand, remain, and be the* "*law of this Realm for ever; and the same are by their said* "*Majesties, by and with the advice and consent of the Lords* "*Spiritual and Temporal, and Commons, in Parliament assem-* "*bled, and by the authority of the same, declared, enacted, and* "*established accordingly.*"

"*XII. And be it further declared and enacted by the autho-* "*rity aforesaid, That from and after this present Session of Par-* "*liament, no dispensation by* NON OBSTANTE *of or to any Statute,* "*or any part thereof, shall be allowed; but that the same shall* "*be held void, and of no effect, except a dispensation be allowed* "*of in such Statute, and except in such cases as shall be spe-* "*cially provided for by one or more Bill or Bills to be passed* "*during this present Session of Parliament.*"

COMMENT.

Multitudes of letters patent and grants from the crown in the reigns of several Kings and Queens depended upon *non obstante's.* By the Statute 1 Henry IV. he that petitions to the King for lands, &c. must in his petition mention the value of the thing, &c. or else the King's letters patent, &c. shall be of no effect; and yet, letters patent with such omission, and a *non obstante,* had been held good. As to these patents, therefore, it was thought proper, not to condemn them for *the time past,* but leave them to the decisions of the Courts of Justice in the ordinary way*: But as to *future letters patent and grants* of this description, it condemns and annuls them.

This article of the Bill of Rights has the appearance of introducing *a new law,* but it was only a declaration of what was the common law.

* Vid. Commons' Journal for 11th Feb. 1688.

"*XIII. Provided that no charter, or grant, or pardon, granted* "*before the three and twentieth day of October, in the year of* "*our Lord one thousand, six hundred, eighty nine, shall be* "*any ways impeached or invalidated by this act, but that the* "*same shall be and remain of the same force and effect in law,* "*and no other than as if this act had never been made.*"

I have now, I trust, sufficiently proved by my comment on the Bill of Rights, that the Revolution was *just, moderate,* and *expedient;* nay more, that it was a proceeding ACCORDING TO LAW, and that *Blackstone* might have safely placed it on that firm foundation. I have also proved, I trust, that the Revolution did not, as *Lord Mansfield* supposed, take away any Prerogatives of the Crown; but that the rights and liberties of the people, and the Prerogatives of the Crown, were, *by law,* the same before, as after the Revolution. The Whigs at the Revolution were not innovators. They arose, at the hazard of their lives, to prevent innovation. In England, tyranny is innovation; and liberty is law. The Bill of Rights was not an alteration, but a preservation of the law. Most true was what *Lord Camden* (an ardent admirer of Lord Somers) said upon a great occasion.—"THE REVOLUTION RESTORED THIS CONSTITUTION TO ITS FIRST PRINCIPLES. IT DID NO MORE. IT DID NOT ENLARGE THE LIBERTY OF THE SUBJECT; BUT GAVE IT A BETTER SECURITY. IT NEITHER

WIDENED NOR CONTRACTED THE FOUNDATION, BUT REPAIRED, AND PERHAPS ADDED A BUTTRESS OR TWO TO THE FABRIC*.

* Case of Seizure of Papers, 11 vol. State Trials, p. 321, Harg. Edit.

END FO THE FIFTH BOOK.

APPENDIX.

No. I.

Notes of Debates in the Convention Parliament.

MR. SOMERS most anxiously performed his duty in the House. His industry and ability (were other proofs wanting) would be evinced by the memorandums and notes he made of the debates on the great days of the discussion of abdication of King James the 2d, on the 28th and 29th of January, 1688, 9. Never was there a more important discussion in any place, at any time. What follows, is a memorial of those celebrated debates. The second Lord Hardwicke published them from the notes of Lord Somers, taken with a pencil*, and will be found interesting. In Grey's Debates notice is taken of these debates, and for the most part the two reports agree; but in some respects they essentially differ.

"*Mr. Dolben. Vacancy in the Government and the King demised.*—King withdrawn without provision.—Fact clear.—Law plain.—1. The word shews it.—2. The same reason for providing, whether his demise be merely civil, or whether it be natural, as well as civil.—Chasm in the

* 2 Vol. Lord Hardwicke's State Papers, p. 401, &c. In Torbuck's Parliamentary Debates, for that period, 2 vol. p. 182, no notice is taken, except of the *result* of the debates.

administration.—Total failure of justice.—Authorities.—Edward IV. upon the rumour of the Earl of Warwick's coming, fled: Held to be a demise, and all proceedings discontinued.—Judges learned at that time, Lyttleton one.—*Obj.* Edward IV. returned.—*Answ.* But that was by conquest.—Edward II. resigned by duress, yet adjudged a demise in the same term—1 Edward, 3. 3.—Richard II. resigned *per minas.* Rast. 528. b.—In this case* departure voluntary.—King acknowledged it. —Did the same thing twice.—This consonant to other laws.—Grotius.—Hottoman.—*A prince ceasing to administer justice, he ceases to be king.* —*Moves, that it is the opinion of* the Committee, *that King James II. is demised by voluntary departure, in consequence of which,* the government *is without a king.*

Mr. Arnold. Seconded.

Sir Richard Temple. Before he went destroyed all the foundations of the government.—In respect to parliament, what arts were used! Turned out all men, who would not comply.—Modelled corporation.—Westminster-Hall an instrument of slavery and popery.—Judges turned out, till the dispensing power owned.—Ordinary justice destroyed, and extraordinary relief prevailed.—*This is falling from royal powers.—He is a tyrant who acts against his own laws.*—Church ruled by ecclesiastical commission law.—Freeholders by martial law.—If no vacancy, how came we here?—What steps have been taken towards a compliance?—He suppressed the writs for calling a free parliament.—Took away the great seal.—*In breach of his oath, endeavoured to subvert the government.*—That relinquished, as to the exercise.—Provide for yourselves.—Your resolution already declared by placing the administration in the Prince of Orange.

Mr. Howe. Thinks it a forfeiture, though he has not the same fears.

Sir R. Howard. Instructed by three worthy persons who have spoken.—*Not merely to rest it on a demise.*—Other English kings have sucked in the poison of arbitrary power.—That not enough in this instance, our souls must have been enslaved.—Nothing left to subvert.—

* i. e. James's.

Usurped all civil and ecclesiastial power.—Violence ever attending his religion.—Corporations.—Closetting.—This Richard the Second's design. —High Court of Special Justice, to ruin religious rights, as the dispensing power, the civil.—Ask, if after this a king?—*But a king can do no wrong.—This is to quit the part of a king, to act that of a tyrant.* Bracton.—Fortescue.—Every man has a divine right to his life; forfeits it if he breaks the compact.—So the king.—*Compact is the origin of power.*—Grotius says so.—People part of the legislative power.—Abdication of the government.—Declaration for liberty of conscience would have ruined both church and state together.—*Right devolved on the people, and we must form ourselves.*—The king has abandoned us in detestation of his people, as poisoned; and meant to carry away from us all means to help ourselves.—Moves, some stronger words to be inserted in the question. "*That James II. having endeavoured to subvert the constitution by breaking the original contract,*" *&c.*

Mr. Polexfen. If voluntary going, and nothing more in the case than a descent, and if so, what do you do here?—If not voluntary, consider carefully on what to rest it.—*All agree the throne to be vacant.*

Mr. Dolben. Departure voluntary sufficient.

Sir James Oxenden. He went away with design to stir up all the foreign powers, *so voluntary.*

Sir H. Capel. Inconsistency of our government with a popish head.—Queen Elizabeth laid the foundation of a protestant government. —Oath of supremacy.—Oath of allegiance.—*Two principles of popery. 1st. No faith to be kept with heretics;—2d. Positive obligation, to extirpate them.—Papists may be fair men, taken one with another; but when church or government concerned, they are in the power of priests.*

Sir R. Sawyer. Difference between an abdication, and a dissolution of the government, to which the argument of some leads.—What then do we here, or the second estate in the other house?—We are not the people, collectively, nor representatively.—We are the third estate in the regular course, and the constitution monarchical.—Copyholders,

leaseholders, &c. are the people.—Prince's declaration, is for a parliament, which supposes a constitution.—*If dissolution, Lords only represent their own vote as individuals, and ought not to meet as an estate.*—Not in the minds of people to dispose of crowns; but to set the government on its true bottom.—Reason why we should come here; greater part of the other house assume it to themselves, to meet, on the same principle of *necessity.*—So the prince and nation judged it.—Writs recalled.—King withdrawn.—No possibility to come at the parliament.—Formalities used upon a natural demise.—We have no power to decide of ourselves, but must give the people's consent.—People must declare what they think of this demise.—*Quest.* Whether this departure so circumstantiated *is an abdication? Thinks so.*—Several breaches precedent are certain evidences *quo animo.*—Religion interwoven with the state.—*To refuse to govern, according to the constitution, is absolutely to disclaim the government.—And he, who withdraws on such account, abdicates.*—Never heard of so short a reign so full of violence.—Declaration tells you what was his mind.—Putting all into the popish hands.—Suborning a parliament.—Richard II. the only instance.—One remedy, as we judged, a parliament.—Recalling his writs, a continuation of his mind.—At liberty when beyond sea, and yet no application towards administering.

Mr. Boscawen. We are supposed to be a representative, and can be nothing else.—In former proclamations it was made out, that he being a King of such a religion as he is, would do as he has done.—King gone away with his seal and child.—*Throne vacant.—Should set up him who is most able to govern.*—The author of all your mischiefs.—Not to fight with a bulrush.

Sir William Pulteney. Crown descends not from heaven; then must come from the people.—If error to let him go, to recall him double.—Should attempt it with halters about our necks.—Crown often disposed of by parliaments.—Dispensing power.—Bringing in foreign jurisdiction.—No wrong done if not by him.—Said to be traiterous to distinguish between power and person, but all governments depend upon it.—To take it into our consideration not to run back.—As little wrong

as may be.—Consider your deliverer.—Do what your posterity may bless you for.—Never expect the like game again.

Sir Thomas Clarges. Crown void, has a consequence of an extraordinary nature.—*To make an election, will turn constitution into a commonwealth.*—The prince took this to be a full and free representative.

Sir William Williams. Every man knows King James is out of the kingdom, and in France.—*How left it, voluntarily, or by compulsion, will not pretend to determine.*—No administration left behind him.—That fails.—The constitution is broken.—French interest repugnant to ours.—Is for declaring that King James, in having become a papist, and by withdrawing, has deprived the kingdom of the exercise of kingly government.

Serjeant Maynard. Some papists rule well, so leave it out.

Mr. Finch. It is said he has *lost his crown by acts; and by going away has abdicated.*—One consequence can result from this question, what it is?—*If that consequence be, that the constitution is devolved upon the people, few will come up to it.*—If that the constitution is dissolved, believes no wise man will come up to it.—If to declare the throne vacant, is to say, that he has lost the inheritance, thinks even that further than any one will go.—The single consequence is that James II. is not king.—Then is the throne filled with the next successor.—The monarchy is not elective.—*The monarch can only forfeit for himself.—The exercise in him for life; cannot dispose of or resign the inheritance.*—Has difficulties.—Not excuseable, what the king has done.—*His going away does not seem a total renunciation.*—We are not to send proposals.—That will not consist with our security.—Suppose the kingdom under an infant.—Security must consist in the unanimous concurrence of the kingdom.—Suppose the king misinformed of the constitution, will that be a forfeiture?—King *may endeavour to subvert the constitution,* and so render it unsafe to live under him, because he is so easily abused.—*Nation may provide for the administration in case of lunacy.—So in this case.*

Sir Thomas Lee. The gentleman is debating the conclusion before he has settled the premises.—The king may advise his ministers, instead of being advised by them.

Mr. Finch. Too late to debate the point I went upon, after this resolution agreed to.—If the case be, as the gentleman stated it, there is only a cessation of the exercise.

Sir Charles Musgrave. Part of the question is, that the king has subverted the constitution.—*But it is clear that remains still.*—No answer given to what has been said.—Demise, abdication, &c. the same things.—There is an end of that question.—The right and the exercise must be distinguished.—*Have a care of deposing.*—A kingdom near us*, which if our reasons do not satisfy, they may prove ill neighbours. *Would be clear, whether it be the intention to depose him.*—If he has forfeited the inheritance, how would we supply?—If not, is under great difficulty, as to declaring the throne vacant.

Mr. Wharton. *He is no longer our king, whether he deposes himself or not.*—Not for the safety of most here, that he should come back.

Sir Chr. Musgrave. All are equally in danger; *Desire to know if the thing may be done, the king deposed?*

Serjeant Maynard. *Whoever put that question, I know not his meaning; but am afraid of it.—The true question is, whether the king has not deposed himself?*—Put the case, and it will appear no new one.—All mixed government has its foundation in consent.—It is clear that there may be transgressions as will not amount to a forfeiture, but will prove to all that he ought to govern no longer.—The papists pervaded all parts of government.—The whole revenue was granted to the king by parliament for life.—What was asked in return?—Only that popish officers might be dismissed; and we were dismissed instead of them.—If what we are doing is wrong, every man is alike guilty.—We have been alike involved in the same danger.—It was come to the

* Scotland.

same pass, as Matthew Paris talks of in King John's time.—Ireland yielded up: had infatuation enough to have induced him (like that king) to make a 500 years grant of the monarchy of England.—Remembers former times of confusion; hopes these in the end will be as memorable for peace and order.—In the year 1641, Ireland filled with massacre and rebellion.—200,000 protestants slain in a short time; 500,000 left; what must have become of these under King James?—The native Irish, because papists, were let into all employments.—The king would have given away the soil; given up 500,000 of his subjects—Was this like an English king?—Can he sell or give away his subjects?—An act of parliament was made to disarm all Englishmen, whom the Lieutenant should suspect, by day or by night, by force or otherwise.—This done in Ireland for the sake of putting arms into Irish hands.—The engineer was called the king's attorney, and bombs his *quo warrantos*.—Every popish king, if he had power, would destroy all protestants.—See their condition, in France, Spain, Hungary.—*We do not depose him.—It is his own act.*—If seven bishops present an humble petition, it is prosecuted as a libel.—*We have seen all St. Omer's in his majesty's councils.*—This design was dark, continued, uniform, to destroy the protestant religion.—This necessarily complicated with design to destroy protestants; to destroy parliaments.—His religion justifies and commands this extended ruin.—The *mirror of justice* sets down the beginning of this monarchy.—A king chosen and sworn to laws, the constitution not subverted in respect to this right.—To say *abdicated* and *void*, the same thing.—*If the government be abdicated, the throne is vacant.*

Sir H. Capel. Surprised to go on so slowly.—We could not prevent this prince, before his time, from succeeding; now we cannot exclude him, having left us.—*No constitution, which in case of extremity, may not relieve itself.*—Will you set him upon the throne?—*If you limit him and impose a regent, you alter the government.*—It is said, all this is owing to ill advisers.—If those be ill that advise, those are faulty who plead for him.—You have collected the sense of the house, and are ripe for a resolution.

Mr. Howe. Mr. Harbord. Sir J. Treby. This is a matter which requires patience and calm thought.—Question is, whether we shall be overturned by popery and arbitrary power?—*To determine whether we can depose, is to enter into a question in vain, as well as dangerous.—We find the throne vacant, and do not make it so.*—A worthy person intimated that the crown was on the head of somebody; and that the king went out of his wits as with lunacy, not abdicated the government?—If so, he could have told you who wears it; what can supply the government?—Take care whilst we debate of subtilties, and start at shadows, lest there be not a spot of ground in this country on which a protestant may set his foot.—It is said by another member, that we do not represent a fourth part of the nation, because (forsooth) we are not elected by those who have no share in the government by the constitution of it.—But is it now a question whether we have authority?—We have exercised the highest; disposed of the administration: appointed a thanksgiving.—The king has renounced his legal government, and fallen from it.—*He that will not, or cannot exercise it according to law, is no longer king.*—Two parts in government.—Commanding and obeying.—Legislative power and executive.—The dispensing power introduced into the latter, has overset the rule established by the former.—He cannot now treat with his people in parliament; has insisted on *the inherent inseparable authority in the crown to dispense.*—The High Commission Court would have found pretences to deprive protestants.—The dispensing power would have filled the church with papists in their stead.—As to the legislature,—When corporations were all dissolved, he might have named his parliament. Between the regulators and dragoons, a parliament would only have represented the king, or the papists.—*Where the king infringes the liberty or property of a private man, we may soothe and pacify, and submit.—But when the fundamental laws themselves are invaded; when the malefactors who broke them, are by fraud or force made the parliament who frame laws: these are violations which shake off the king.—Have we then occasion to touch the question of deposing?* The highest article against Richard the Second was, that he packed a

parliament.—In 1607, King James the First expressed his sense clearly to the parliament when he said, that the king leaving off to govern according to law, ceases to be king.—It was a great argument against the Exclusion Bill, that no other papists besides the king could be in office.—His friends answered for him, that the Test Law would be inviolable;—Yet he pretended only to leave it in force as to the House of Commons.—When petitioned by the Peers concerning it, how loth to yield o them?—See the consequence of the credit which you gave him.—*As to the motion, express it as you please.—We are without a king.*—I think in his own judgment, he is fallen from the throne.—He swore to administer the laws, which are free and protestant.—But it seems he is under an higher obligation to break them.—Is not this to say, "My administration must be a contradiction to my office."—*Is it not a renouncing?—His actions have all spoken it.*—Recal him? His obligations are the same.—His last use of the great seal, was to pardon the malefactors, his advisers.—Moves to insert the words, "*by advice of Jesuits and other wicked persons, having violated the fundamental laws, &c.*"

Mr. Finch. Question, If the king has lost his title to the crown?—I think no man safe under his administration.—No safety but in the consent of the nation.—*The constitution being limited, there is a good foundation for defensive arms.—It has given us right to demand full and ample security.—If there be an expedient wherein all may be secure and all agree, that is the best.*—1st. We are to examine and inquire of the succession.—2d. Every man must swear to it as lawful and rightful.—In the prudential part, let what must occur to you on the second head, guide you as to the first.—All would be secure, yet all cannot come up to what some of us seem inclined to determine in point of right.—Did not mean to capitulate with the king, but establish the government.—*Meant a regent, in which all may agree.—That which comprehends most, will be most secure.*—Would declare that the king ought not to be intrusted with the administration; so should be the question.

Sir R. Howard. A regency and the king are all one.—The question as moved and amended, takes in the sense of the house.—Much is said of the succession.—But we are the people.—And threaten ourselves by ourselves, when the question is asked, shall we dare to choose? —*To talk of preserving the succession as sacred, is to suppose the title of the Prince.*—A thing well cozened.—If he should die, the king of France will find another.

Lord Fanshawe. It is said the king has withdrawn himself.—*Gone away by compulsion in my judgment.*—Heard him say, that he was afraid of being seized by his own subjects.—When he was at liberty at Feversham, he came back.—*Asks if we have power to depose?—In law, king can do no wrong, for that reason ministers are called to account.*—No occasion for haste.

Lord Cornbury. Desires the question may be explained.

Mr. Roberts. If the question is to have no other consequence than would follow on the king's natural demise, will go nemine contradicente.—*Question put in the Committee.—Three negatives.*

Lord Colchester. Moves to report it presently.

Sir William Williams. Moves the house to sit to-morrow and receive the report.

Sir J. Knight. Arms of France invading all the rights of this kingdom.—Foreign plantations.—Ireland invaded.—Would immediately have a head.

Mr. Wharton. To report immediately.

Mr. Wogan. To-morrow.

Sir Rowland Gwyn. Time precious, would report now.

Sir R. Sawyer. To-morrow.

Sir Walter Young. Immediately.—May do more, now unanimous.

Sir J. Lowther. Report what done to the House, and consider of it again to-morrow. For our honour to proceed deliberately.

Mr. Medlicot. Security depends on dispatch.

Sir J. Knight. Consider the bleeding condition of trade.—*Agreed with the Committee by all but one in the House.*

Sir R. Howard. Moves to send up the resolution to the Lords for their concurrence.

Mr. Boscawen. Seconds.—Mr. Hampden to carry it up.

Resolved, That King James the Second, having endeavoured to subvert the constitution, by breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and that the throne is vacant.

Mr. Hampden in the chair, 29th January.

Colonel Birch. King deposed himself.—Fear upon him from his own guilt.—Continued attempts upon our liberties.—Nothing left but the disposing of the people's money, and that challenged as a right last parliament.—From the Spanish match downwards, popery has been coming.—The war followed.—King Charles delivered himself from two of the estates by never calling them together for many years.—Ship-money.—Monopolies.—I will not determine, but he brought the character of his government near to what was solemnly declared yesterday.—Popery and idolatry were at the bottom.—When the late king James would marry this lady, I asked a great man at that time, whether he meant to perpetuate to his family a war with the House of Commons?—Popery will not prosper, but in an arbitrary and tyrannical soil.—Inconsistent, ruinous for a protestant state to be governed by a popish prince.—*Moves to resolve, That it is inconsistent with the safety of this protestant kingdom to be governed by a popish prince.*

Pilkington. Seconded.

Sir R. Temple. Found by experience that the government of a popish prince is inconsistent with the ends of government in a protestant kingdom.

Sir R. Napper. Woeful experience.

Sir R. Sawyer. Inconsistent with the interest of a protestant kingdom to be governed by a popish king.—Law ought to be made; civil and religious rights interwoven.

Lord Faulkland. Yesterday allowed he was king.—Nothing inconsistent with our laws.—It is no offence to refuse the Test.

Tipping. It has been found by experience inconsistent with the safety and welfare of a protestant kingdom to be governed by a popish prince.

Sir William Williams. A negative on this question, would be inconsistent with your vote yesterday.—Passed *nem. con.*

Mr. Wharton. Yesterday the throne vacant.—All are for filling it again.—*Adhere to the constitution as near as possible.*—Business of the greatest weight.—*Pitch on none so well as the Prince and Princess of Orange.*—Making them as capable of protecting us, as may be. Philip and Mary, King and Queen; William and Mary, King and Queen of England.—Moves *to supply the vacancy of the throne.*

Sir Duncombe Colchester. Our being here, owing to the Prince.—*Gratitude to pitch upon him.*—Seconds.

Lord Faulkland. I hope we shall secure ourselves from arbitrary government, as well as popery.—Lay the foundation before we raise the building.—Two kings the constitution will not bear in a joint sovereignty.—We are likewise to see what regal power is.—Never leave the dispensing power doubtful, or the high commission subsisting.—*Fundamentals too may be destroyed, by corrupting parliaments.*

Mr. Garway. Consider what terms must be made to provide really and effectually for our own safety.—Not deliver up those who sent us.—But make such provisions as may prevent future invaders.

Sir William Williams. Settle the terms.—*Would enact no new constitution, but make declaration only, and pursue the old.*—If any thing amiss, find out the causes—Then the remedies.—Then the persons fittest to administer.—The Prince's declaration states much of your grievances.—*The person is the last thing to be thought of.*—In the year 1660 there were many hard laws, made grievous to the people.—Much enhanced the prerogative.—Corrupt judges and counsellors took courage from them.—*That convention often cried out upon for taking no better care.*—King Charles the Second, a young man when called to the crown.—Vast sums granted.—*Militia act; an antecedent question, Whether the power over it in the crown, or people?*—Said to be indecent, that he did not come into the crown with all its

lustre at that time.—But now we speak for England.—*This is the time to be free, now the throne is vacant.*—Corporation act was arbitrary.—Weak and knavish judges will do knavish things.—They read none of the law books, and so read nothing to the contrary.—You have set an example of arbitrary proceeding.—Given power to levy a sum of money without parliament.—Adhere to the ancient constitution.—*We are to look beyond the conquest.*—Original contract in your votes.

Mr. Christy. A Magna Charta.—Coronation Oath, to preserve the protestant religion.

Sir Richard Temple. Not launch into such a sea.—Three heads: 1st. Provide against encroaching on parliaments for posterity.—Certainty of them.—Triennial Bill taken away in a thin house.—Not only called to serve the ends of the crown.—That no pardons may be trumped upon us.—Election of parliament secured by making corporations tools.—2d Standing army settled without consent of parliament, though no part of constitution.—May be allowed in case of war, invasion or rebellion.—Militia Bill.—Power to disarm all England.—Now done in Ireland.—3d. Westminster-Hall must be better filled with persons who are honest, and are judges for life, with fixed salaries.—Take care as to juries; sheriffs; strange fines.—As little as may be of power to be directed by the discretion of the judges, who did not decide great questions formerly, but sent them into parliament.—That was the occasion of calling parliaments frequently.—Let the oath of King be taken by them, (the Prince and Princess of Orange,) before they enter into government.—Prince has called upon you to pursue the ends of his Declaration.

Lord Renelagh. Prince's declaration, a good foundation to build a settlement upon.—His letter confirms it.

Mr. Boscawen. Arbitrary power exercised by the ministry.—Acts of long parliament.—Corporation Act.—That the same with the resolution.—The most loyal or deserving, turned out.—Militia.—Imprisoning without reason; disarming.—Himself disarmed.—Trophy money, &c.—Triennial Bill.—Necessity begot it.—Nothing hindered us from going into slavery, but that bill, said by Lord Chief Justice Hales.—*Moves,*

That before the Committee proceed to the nomination of any person, to fill the vacancy of the throne, they will provide such things as are absolutely necessary for securing our religion, laws and liberties.

Sir J. Knight. We shall find the papists immediately upon us.

Serjeant Maynard. Two things moved.—One to fill the vacancy of the throne; the other, before we fill the vacancy, to make provision for our security.—Agree with the last part of the second question, but would not delay to supply the throne, lest instead of an arbitrary government we should have none.—It has been said, we must go beyond the conquest. *Puzzled to find what was law in the Saxon times; tedious and fruitless search.*—Some particulars well propounded.—Some gross grievances, for which we are beholden to a parliament who cared not what was done, so their pensions were paid.—Militia Act.—An abominable thing to disarm the nation, to set up a standing army.—Corporation Act carried into execution, with a high hand.—If any man offered to stir, to remonstrate, to complain, it was cried out by some, the act of oblivion too large.—Could name them.—Acts of violence.—Corruption of judges, instead of *durante bene placito,* should be *quam diu se bene gesserint.*—But we must so take care for the future as not to be lost at present.—The army has been corrupted formerly, may be again.—*Let us not delay to set the government in motion, under whatever fair pretence, lest we give occasion to moles, who work under ground, to destroy the foundations you laid yesterday.—This is my fear, dictated by the knowledge and experience of past times; and this as a true Englishman, who love my country better than my life.—The things mentioned are obvious in your present situation, easy to be attained.—But it is essential and of immediate necessity there should be a king.*—The law has so bound the king (whether you declare it anew or not) that he can do no wrong, unless wicked counsellors advise to break it, but in this there can be no mistake for ignorance.—*You are without power, without justice, without mercy; other things require time, and admit of it.*

Lord Faulkland. Would justify myself to those who sent me hither, as not merely wanting to change hands.—Satisfaction of the

people as well as army.—If we act with love of the people, we shall pursue their interest.

Mr. Sacheverel. Shall be laughed at, if not look after ourselves now.—When the Prince declares your security shall be lasting.—No man knows what he can call his own, unless you look very far back.—Disarmed and imprisoned without cause.—Scarce three laws of twenty years deserve to be continued.—Money.—Overshot themselves at that time (1660), not to do so now.—Way to have a good law abolished, if you did but name it.—Proved that many pensioners agreed for so much in the hundred for all they gave.—*An old law still in force, the parliament shall not be prorogued till all the grievances be redressed:* when such grievances brought in here, we were sent away the next day.—Warrants to take up all non-conformist ministers, or such as were thought to be disaffected to the government, because they endeavoured to choose members whom they (the court) did not like.—Secure parliaments rightly and duly chosen.—*Their sitting so as not to be broken up at pleasure.*—No extravagant revenue to be granted as may enable the crown to carry whom it pleases into elections.—Make false returns more penal.—*Am for proceeding to these things before you fill the vacancy.*

Mr. Polexfen. Whatsoever things you would declare will not only require consideration here, but must be agreed by Lords as well as Commons.—The proposition excellent in itself, but if it have the effect to confound us, a dreadful proposition.—Am as willing as any to apply redress to grievances.—But to delay supplying the government, will restore the king: View the present condition of the kingdom.—If this should go beyond sea, that we are bounding the kingly power, before there is one to assume the exercise, what consequence will it have?—Unless jealous of friends, your worst enemies cannot hinder you from coming to a settlement.—See what delay is doing.—This month has lost one king.—The army ready to mutiny.—Every factious interest will run in there.—*Fear of popery has united; when that is over we shall divide again.*—It was thought impossible formerly that popery should come here.—King James, long since, seemed to declare,

"That cannot be done till I am king."—As to the Prince and Princess of Orange, you have no reason to mistrust good words, unless it be accompanied with ill actions.—But their actions abroad give me reason to believe them really protestants.—His declaration speaks the same thing. —His actions confirm it.—*He might have taken the crown, instead of leaving us in debate.*—You have no law till there is a king.—Those who prevailed by arms in the late times, in coming to a constitutional government ruined themselves.—If Oliver had settled into a government, he might have saved his party.—*We busied ourselves about a bill of exclusion some time since.—Some for that bill, others for limitations.—We talked so long about it, that we were sent away without doing any thing.—Will there be less talk now on these points of rights?*—Besides, your terms may be such at last, that when you come to offer the crown, with new limitations not known before, it may be rejected.—Common destruction will overtake us, whilst we debate those things, without the protection of a legal government.

Lord Faulkland. No doubt of the Prince and Princess of Orange.—What is done by us before the offer of the crown, will be no argument of distrust.—What has been felt in the two last reigns, is a sufficient ground for us to proceed.

Mr. Garway. Somewhat must be done.—Many things named.—*Represent our sense to him.—That it may be passed hereafter into laws.*

Sir Edward Seymour. Good things often suffer by over doing.—*Not for making new laws, but declaring old.*—Declare against dispensing power; power of Westminster Hall.—Great part of the revenue depends on the demise of the king.—*Can we dispose of a crown,* and not *have power to secure ourselves?*—Not live like a slave in England.—Administration is in the Prince's hands.—Consider the end of your meeting.

Sir T. Lee. The objection is spending long time.—Amongst others this opinion should be exploded, that the King can raise what forces he thinks fit in England, provided he can pay them.—He who first broached this doctrine obtained a great place in judicature.

Sir T. Clarges. Necessary something should be done for common safety, and to pursue the Prince's desires.—Moves that a committee may be appointed to draw up some heads to be presented to our chief governor, when declared.

Colonel Birch. If the Prince of Orange would live till we are all dead, we might hope for safety under him. Our security must be in settling the government whilst we have him. Yet the discontents will rise much higher, if you do not do somewhat besides filling the throne. —*As to the time, it cannot take a day only to mention them as heads.* —We have resolved to fast to-morrow, (30th of January), we know what we fast for.—We have often sat on the Lord's day.—May take up our thoughts to-morrow.—Some such declaration will give you more strength and credit.—By way of addition to what has been observed on that head, think *hearth money* a badge of slavery. *The taking away of that law will bring him more strength than twenty armies.* The question, as just moved, is not too general may trust ourselves.

Mr. J. Hampden. We make free thus to act for a nation not tied by oaths.—Know, time presses.—They will ask why the king has abdicated the government.—*If you declare the constitution, it will be no law that can bind.*—Have looked into the journals, and find the convention in 1660 was of *King, Lords, and Commons.*

Sir William Pulteney. Difficulties on each hand.—*Would have a committee appointed to draw up heads.*

Mr. Dolben. Has a reason for dispatch in his hand.—Letter from a noble Lord in Ireland, that just ready to execute.

Mr. Harbord. Nobody will go farther for maintaining the constitution.—A principal thing is to make examples of those who broke it.—Security infallible.—The revenue is gone by the vacancy.—Cannot these things be doing in the mean time that you settle the government? —The Dutch are calling home their troops with impatience.—Factions in the army.—If these break out, where are all your laws and declarations?—Preserve your government.—It is the sword of a king must protect you.

Sir R. Sawyer. Some complain of laws, some of the transgression of the laws.—Offences punishable in Parliaments, and in ordinary courts. —Great offences are to be punished in Parliament.—No provision.—Would you make another contract with your prince, than your ancestors have done?—Nothing can be done till it is debated.—Are you satisfied the laws are good?—Declare no power of suspending, and *that Parliament shall sit some stated time.—Work cut out, will employ several weeks.*

Sir R. Temple. Go on presently to declare the necessary heads.—*Convention of* 1660, *which brought in the king, made several acts.*

Sir T. Littleton. Soon agreed in two things.—1st, To fill the government.—2d, To secure our liberties.—This may be done in a little time by naming the heads. Refer it to a committee.

Sir J. Guise. When fill up the vacancy, the same time present a declaration.—Appoint a committee, and at the same time proceed to nominate.

Sir Charles Musgrave. No power to appoint a committee.—Restrain your question.—*Cannot answer it to the nation or Prince of Orange till we declare what are the rights invaded.*—When you declare your grievances every man will take them to be the reason of your vote yesterday.—Make your wheels before you put the cart on.—*Declare your ancient government, then set it up.*—Motion, That *before the committee proceed to nominate a person to fill the throne, that the House be moved to appoint a committee to bring in general heads.*

Mr. Garroway An essay has been collected by a *worthy gentleman.*

Mr. Polexfen. Reads a paper.—*Unless Parliament regulated, no security.*—Clause about pardons to be added.

Sir H. Capel. Parliament so truly English.—No prejudice to the crown, in taking care of our properties.—Security to it.—The crown indebted to the proceedings of this day.—Two witnesses to one fact in treason.

Sir William Williams. Collect a question.

Sir R. Hobart. Extravagant bail.—Lord Lieutenants.

Lord Faulkland. Exorbitant fines.

Colonel Birch. The paper only an essay.

Sir H. Temple. King's Bench.

Tipping. Counsel *in cases of treason and felony.*

Ettrick. To proceed to nominate looks like election.

Mr. Poley. Seconds it, *not to use the word nominate, as it comes so near electing, in the question about supplying the vacancy.*

Mr. Sacheverel. Declare is too much, the Lords may quarrel.

Sir J. Lowther. If you make such declaration, before vacancy supplied, may admit of another construction abroad, and in France, than intended here.—Of equal use to you to make such declaration, without notice taken of intention to supply afterwards.—So leave out the first part of the question.

Jephson. Give no occasion to enemies abroad.

Medlicot. Declare, instead of nominate.—Passed, nem. con.

Lord Faulkland. Now ready to nominate your committee.—Move the House, that the gentlemen of the long robe may proceed.

Sir Thomas Clarges. Intention that no such thing should be done. —Ordered to report the vote to the House.—That it is the opinion of the committee that it is inconsistent with the safety, &c.

Mr. Hampden. Reports first resolution, nem com. *To appoint a committee to bring in general heads of such things as are absolutely necessary to be considered, for the better securing of our religion and laws and liberties.*

Sir H. Capel. Moved to add these words, *To the end that we may more speedily proceed to fill up the vacancy of the throne.*

Mr. Sacheverel. No reason for it.—Moves to desire the concurrence of the Lords to the first vote.

Mr. Hampden. To carry it up.—Naming the committee, every one to stand up.

Sir Joseph Tredenham. Exorbitances of Westminster Hall most complained of.—Not to go upon general words of the long robe.

Mr. Howe. May be, some of the gentlemen of the long robe guilty.

Lord Dunblain. Long robe as great a grievance as any.

Mr. Harbord. Committee to meet to-morrow about eight o'clock in the Speaker's chambers.

Mr. Jephson. Great business on our hands.—To sit to-morrow.

Lord Wiltshire. Defer filling up the vacancy no longer than the House needs must.—Sit to-morrow.

Lord Ranelagh. Not to sit to-morrow, keep Acts of Parliament, not break them.—Committee appointed to meet to-morrow.

Mr. Levison Gower. Reflection to sit to-morrow, so it would be not to sit at all.—Hope they will dispatch by that time, and we to sit to-morrow at two o'clock.

Lord Faulkland. Sir J. Guise. Seconded.

Sir R. Napper. Mr. Boscawen. Sir R. Howard. Nothing disingenuous.—Agreed to sit to-morrow at two o'clock.

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An account of the life and
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